Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
JULY TERM, 2004

MICHAEL EDWARD LEBRUN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Petition For a Writ of Certiorari
From The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether Defendant was in custody requiring *Miranda* warnings when federal agents began questioning him at the Missouri State Highway Patrol Building on September 21, 2000.

2. Whether under the totality of the circumstances, as found by the District Court and the Eighth Circuit panel opinion, defendant's admissions were involuntary.

3. Whether Defendant's statements to the decedent's sister were not voluntarily made under the totality of the circumstances.

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IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, *en banc*, vacating the panel opinion, reversing the judgment of the district court, and remanding the case for further proceedings is reported at 363 F.3d 715 (8th Cir. 2004). A copy of the 2004 Opinion is attached as Appendix 1. The vacated Eighth Circuit Panel opinion, which affirmed the District Court's suppression of Mr. LeBrun's confession, is reported at 306 F.3d 545 (8th Cir. 2002). A copy of the Eighth Circuit Panel Opinion is attached as Appendix 25. The Decision in a criminal case of the United States District Court for the Western District of Missouri, suppressing Mr. LeBrun's confession on the ground that it was obtained in violation of Mr. LeBrun's Fifth Amendment privilege against self-incrimination and on the ground that the confession was coerced and thus obtained in violation of Mr. LeBrun's due process rights, is unpublished. A copy of the decision is attached as Appendix 54.

V. JURISDICTION

The panel judgment for the United States Court of Appeals for the Eighth Circuit was entered on October 3, 2002, affirming the decision of the District Court. The Eighth Circuit granted the government's petition for rehearing *en banc* on December 31, 2002. On April 9, 2004, the *en banc* judgment for the United States Court of Appeals for the Eighth Circuit was entered, reversing the judgment of the District Court. This Court's jurisdiction to consider this petition is invoked pursuant to 28 U.S.C. § 1254(1).

VI. CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Title 10, United States Code, Section 831(d) (Uniform Code of Military Justice)

No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Title 18, United States Code, Section 1111 (App. 90)

Title 18, United States Code, Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Fifth Amendment, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VII. STATEMENT OF THE CASE

Defendant Michael E. LeBrun was indicted in the United States District Court for the Western District of Missouri on one count charging defendant with violation of Title 18, United States Code, Section 1111, that is the murder of Ensign Muns. (Govt. Add-1). The specific charge was felony

murder robbery.

The District Court held a suppression hearing, and on November 16, 2001, the District Court entered an Order suppressing the admissions. (Add. 54). The court concluded the defendant was "in custody" and the agents should have provided him with *Miranda* warnings prior to his interrogation. The court also concluded that all of defendant's statements were not voluntary. Finally, the court concluded the confession to Muns' sister was effectively made to a government agent and therefore should be excluded. For these reasons, the District Court ruled defendant's statements inadmissible and suppressed them.

The District Court reserved judgment and did not make any finding as to what, if any, promise was actually made or what the legal effect of any such promise was. In its November 16, 2001 Order, the District Court disposed of the admissibility of defendant's admissions on other grounds and found it only necessary to determine that the defendant *believed* he would not be prosecuted if he confessed to a "spontaneous" homicide.

The District Court found the following facts:

> With respect to LeBrun's personal characteristics, the Court finds that LeBrun has considerable education and claims to have 'generally' understood his rights, but he was particularly vulnerable to psychological pressure from investigators concerning his pregnant wife, his family, and his health. With respect to the manner in which the interrogation was conducted, the Court finds that NCIS investigators exerted near total control over the interrogation and employed

> numerous psychologically coercive tactics, some of which were aimed at LeBrun's unique vulnerabilities, in order to make him confess. Consequently, the Court holds that LeBrun's will was overborne when he confessed to NCIS agents and Mary Lou Taylor. At the very least, the government has not met its burden of proving that these statements were voluntarily made. Therefore, all of LeBrun's statements made on September 21, 2000 are inadmissible.

(Govt. Add-2, p. 33-34 (Order of November 16); Doc. 64).

On appeal to a panel of the Eighth Circuit, the Court affirmed the suppression of the admissions in a judgment entered on October 3, 2002. On rehearing *en banc*, the Eighth Circuit reversed the judgment of the District Court and remanded the case.

Mr. LeBrun's statements were induced by threats, coercion and illegal inducements in the form of a promise not to prosecute made by agents of the NCIS. Also, on September 21, 2000, Naval Investigators failed to advise defendant of his rights as required under *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant did not make a knowing, informed and voluntary waiver of his rights under the Fifth Amendment to the Constitution of the United States. *United States v. Hanson*, 237 F.3d 961, 962 (8th Cir. 2001).

In January 1968, U.S. Naval Ensign Andrew Muns (the deceased) and Michael LeBrun (defendant) were shipmates aboard a naval fueling vessel known as the U.S.S. Cacapon. Both men worked in the disbursement office where cash was kept in a safe. Muns disappeared from the ship while it was moored in Subic Bay, Phillippines, during the late evening

hours of January 16 or early morning hours of January 17, 1968. (Tr. 6-8).[1] Shortly after Muns disappeared, approximately $8,600 was discovered missing from the disbursement office safe. Naval investigators conducted an investigation and concluded that Muns had stolen the money and then deserted the Navy. In August 1998, Muns' sister persuaded the NCIS, Cold Case Homicide Unit, to re-open the investigation. (Tr. 6; D-2 at 13).

On September 21, 2000, defendant was interviewed by NCIS agents at the offices of the Missouri State Highway Patrol in Lee's Summit, Missouri. During the interview, which lasted approximately 2 hours, defendant admitted to the killing of his shipmate, Muns.[2] (E-1 and E-2). The killing occurred on board the U.S.S. Cacapon sometime during the late night of January 16 or early morning hours of January 17, 1968. Immediately following the statement given to NCIS agents, defendant admitted the killing a second time to the decedent's sister. (E-1 and E-2). NCIS agents had paid for Mary Lou Taylor's travel expenses from Milwaukee, Wisconsin, to be present the day the interrogation was set up. This was so that the NCIS agents could possibly precipitate a confession by defendant by being in the presence of Muns' sister.

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[1]Tr. refers to the transcript of the April 27, 2001 hearing, T. refers to the October 26, 2001 hearing transcript, D-2 refers to the transcript of the November 21, 1999 interview, E-1 refers to the videotape of the September 21, 2000 interview and E-2 refers to the transcript of the September 21, 2000 interview.

[2]Government's Exhibit E-1 is the videotape of defendant's interrogation on September 21, 2000. Government's Exhibit E-2 is the transcript of the videotaped interrogation. Both were admitted into evidence at the suppression hearing on April 27, 2001.

Prior to the interrogation on September 21, 2000, NCIS agents interviewed defendant on four separate days in November 1999. (Tr. 44). On each such occasion, Mr. LeBrun was telephonically contacted in advance and requested to come to a particular facility to meet with investigative agents, and on each such occasion he did so voluntarily and transported himself to and from the agreed site. (Tr. at 8-10, 15-20, 25-28). During three of the interviews, defendant was advised of his *Miranda* rights pursuant to strict guidelines under which NCIS polygraph examiners work. (Tr. 8, 12-39). At the conclusion of the fourth interview, the defendant said he wanted to "see if he could recover his repressed memories" and agreed to stay in contact. (Tr. 23-24). Defendant suggested they set another appointment for "three weeks from now, or something," and told Agent Hughes to "check your schedule and give me a call." (D-2 at 61).

Agent Hughes called defendant on December 16, 1999 to check in with him and see how he was doing. (Tr. 33-34). Hughes did not speak with defendant again until after defendant fully confessed on September 21, 2000. Over nine months passed. In September 2000, NCIS agents decided to interview the defendant again. By then, he was the prime suspect. (Tr. 133). NCIS investigators called Mr. LeBrun and made arrangements in advance for each of the 1999 interviews. Mr. LeBrun drove himself to the place of the interview on each occasion in 1999. These conditions changed for the September 2000 interview/interrogation.

The District Court found that NCIS agents engaged in "quite a bit" of planning for Mr. LeBrun's next interrogation. (Govt. Add-2, p.6, para. 13-15, p. 33-34). The District Court made a finding that prior to the September 21 interview, NCIS investigators had a "tactical discussion" concerning

whether it was to their advantage or disadvantage to read defendant his rights when they interviewed him. (Govmt. Add-2, p.6, para. 16, p. 33-34). The District Court found that NCIS investigators decided to take "whatever measures" they could to avoid reading defendant his rights in order to give them a better chance of getting a confession. (*Id.*; Tr. 126, 169).

Although Agent Hughes denied that the agents chose not to read defendant his rights so that they would improve their chances of getting defendant to confess, the District Court found that Hughes' testimony on this point was not credible. The District Court found that "Agent Hughes' testimony was evasive, inconsistent with the record as a whole, and inconsistent with Agent Grebas' testimony." (Add-2, p. 6, fn. 5).

NCIS agents questioned defendant in the interview room of the Missouri State Highway Patrol headquarters in Lee's Summit, Missouri. Enlarged photographs of defendant's family, his home, his shipmates, the U.S.S. Cacapon, and other scenes from defendant's life were placed on the wall so that defendant would be confronted by these images when he walked into the room. (Tr. 139, 158, 165). The agents also arranged to have the deceased's sister flown in from Milwaukee, at the government's expense, so she would be available to talk with defendant at this interview if doing so would make the defendant more likely to confess. (Tr. 62-63, 169).

On September 21, NCIS Special Agent Early and Corporal Hunter of the Missouri Highway Patrol drove to defendant's place of employment, walked into defendant's office, and without prior notice that they were coming to his office, advised him that they wanted to question him. (Tr. 47,

189). Corporal Hunter advised defendant they were conducting an unidentified investigation and asked him to accompany them to the Highway Patrol headquarters. Defendant asked what the interview was about and the officer said they could not tell him, but that it had nothing to do with his family and that his family was fine. Defendant agreed to go with them to the station house. (Tr. 102, 190).

Defendant volunteered to drive to the Highway Patrol himself, but the agents stated to defendant that they preferred that he ride with them. The District Court made a finding that the agents decided "not to allow" defendant to drive his own car to the interview. (Govt. Add-2, p.6, para. 17; Tr. 190). Defendant rode to the station house in the front passenger seat of an unmarked Highway Patrol vehicle. Both officers were armed and defendant saw Corporal Hunter's gun under his coat.

Defendant testified that he did not know the authorities wanted to speak with him concerning the Muns matter. Defendant testified the investigators could have been part of an investigation by the State of Missouri and the FBI into allegations that defendant's employer, a real estate developer, illegally filled two retention ponds with city water. (T. 7).

Before they went inside the Highway Patrol building, Special Agent Early told defendant that he was not under arrest, that he was free to terminate the interview and leave the building at any time. (Tr. 104, 187, T. 11). He also advised defendant that he was subject to audio and video recording anywhere inside the building. (Tr. 104).

The entire interrogation was videotaped. (E-1). The questioning took place in a "rectangular, windowless room" whose dimensions "are difficult to discern" from the video.

The walls were covered with more than 12 enlarged pictures showing scenes from the defendant's life. The room held 3 chairs and a small table next to a wall. The agents seated the defendant with his back to the wall. Defendant's chair had neither armrests nor wheels, although theirs had both. The agents sat within 3 feet of the defendant on both sides of him. No furniture separated the men. The agents were not armed. (Govt. Add-2, p. 9; Tr. 114-115).

At the beginning of the interview, defendant believed he could leave if he wanted to, but testified that as the interview progressed he began to believe he was not free to leave despite what the agents said. (T. 21-22). He was also dependent on the authorities for a ride home, as Oak Grove is approximately 13 miles away from Lee's Summit and there is no public transportation. The government points out that on five separate occasions during the interview of September 21, defendant was informed that he would be going home after the interview. (See E-2, p.13, 20, 22, 77, 81). These statements clearly carried the implied message that defendant was not going to go home until the agents had completed their interrogation.

The agents repeatedly lied to defendant about the level of evidence they had implicating him in the homicide of Muns. The agents identified themselves as NCIS investigators and told the defendant there was "absolutely no doubt" about his guilt, that they knew he was "responsible" for Muns' death, and that the "only question" was whether his actions were "premeditated or spontaneous." The agents repeatedly threatened defendant. They said that the U.S. Attorney for Alaska was ready to charge him with premeditated murder, which was untrue. (Tr. 58; E-2, p.1-4). They further informed him that he would be extradited and tried there unless he admitted to a "spontaneous murder." They told the

defendant that such a trial would "leave his pregnant wife alone, drain his family's finances, ruin his reputation, and ruin his family's reputation." The agents also told defendant that Muns' family would file a civil suit and ruin his family's name. The agents told defendant that his family would be ruined, like Jon Benet Ramsey's family had been ruined by all the media attention. (E-2, p. 4-7, 10-13, 17).

After threatening defendant repeatedly, after repeatedly lying to defendant about the strength of the evidence against him, and after falsely advising defendant that he was about to be indicted for "premeditated murder" in the District Court of Alaska, the agents told defendant that if he admitted to a "spontaneous" killing, that would be the end of it because the statute of limitations for manslaughter had expired. (Govt. Add-2, p. 10-11, para. 34-39, p.33-34). The District Court found that, based on the NCIS investigator's statements, defendant *believed* that he would not be prosecuted if he confessed to a "spontaneous" killing of Ensign Muns.

The following discussion is from the transcript of the videotape of defendant's interrogation on September 21, 2000, in which he was questioned by Special Agents David Early and Jim Grebas of the NCIS.

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the

truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.

(Exhibit E-2, p. 20).

Mr. LeBrun began the interrogation with the understanding that there was no statute of limitations for homicide and that he therefore had a continuing liability under the criminal laws for a homicide, "spontaneous" or otherwise. Special Agents Early and Grebas took it upon themselves to educate Mr. LeBrun about the fine points of the law on the applicable statute of limitations. It was clearly explained to Mr. LeBrun that only a "premeditated" homicide survived the running of the statute of limitations. The agents neglected to mention to Mr. LeBrun that a "spontaneous" homicide might be creatively charged as first degree murder under the felony-murder provisions of the statute.

Mr. LeBrun was unequivocally advised that the possibility of a prosecution depended exclusively on whether there was "premeditation or not." To reinforce the point, Special Agent Grebas later made the comment that:

> You know what? When you say, 'You know what Special Agent EARLY, I killed him.' You know what. We can stop. Because you know why, you can say this, it wasn't premeditated. It was

> spontaneous. That's all you need to say and we are done. We've got all the why.

(Exhibit E-2, p. 15)(emphasis added).

During this time period, Special Agent Early stated to Mr. LeBrun that "[y]ou can put an end to this today." (Exhibit E-2, p. 14).

Later on during the interrogation, Mr. LeBrun asked further about the statute of limitations and got these responses from the NCIS agents:

> **LEBRUN:** What's the statute of limitation?
>
> **GREBAS:** There is no second-degree murder.
>
> **EARLY:** It's five years from the time of the incident. It's called "manslaughter" in the federal system.
>
> **LEBRUN:** Okay.

(Exhibit E-2, p. 19).

The District Court found that "the cumulative effect of the agents' words and demeanor was to make a reasonable person feel like the questioning would continue until he confessed." (Govt. Add-2, p. 23) The agents also misled defendant about the evidence they had against him. They claimed to have a suicide note written by one of his shipmates that implicated him and that two other shipmates had severe emotional problems because they had witnessed Muns' death. (Govt. Add-2, p. 11).

The agents admitted they used "psychological pressure to obtain a confession." (Tr. 144-145). The District Court found that the agents: (1) used the "blame-the-victim" and "good cop-bad cop" techniques; (2) repeatedly invoked the defendant's family and the cost of a trial because the defendant had identified such things as important to him during the 1999 interview; (3) used "words, body language and tone of voice" that "gave the general impression that the questioning would continue until LeBrun confessed"; (4) told the defendant that Muns' sister was present and that she would forgive him if he admitted to "spontaneously" killing her brother; (5) promised LeBrun that "he would not be prosecuted" if he confessed to a spontaneous killing.

Defendant asked and was allowed to use the bathroom. (E-2, p. 64). Defendant also requested the opportunity to take a cigarette break and use his cell phone to call his wife. (Tr. 107-108, E-2 at 77, 81). During the bathroom break, Special Agent Early accompanied defendant into the bathroom. Special Agent Early testified he went to the restroom because he also needed to use the facilities. However, the District Court concluded that the agent's testimony that he used the restroom facilities was not credible and accepted defendant's testimony that he believed the agent was escorting him. (Govt. Add-2, p. 16, para. 59, p.33-34; T. 8-9, 18). In footnote 7, the Court states as follows: "Agent Early claimed he used the facilities, finished first, washed his hands, and then waited inside the bathroom for LeBrun. (*Id.*; T. 27). The District Court found LeBrun's account to be more credible. "Even though he had enormous motivation to lie, his testimony was simply more sincere." (Govt. Add-2, p.16, fn. 7).

Special Agent Early also accompanied defendant when he

went outside for a cigarette break. In footnote 8 at p. 16, the Court writes "Early claims he accompanied LeBrun outside to ensure that he would be able to get back into the building and to ensure that LeBrun would not hurt himself or someone else. (T. 28). Again, the Court finds LeBrun's account more credible." (Govt. Add-2, p.16).

The District Court cited the government's use of an agent to impersonate Muns' brother as a deceptive stratagem. (*Id.*, at p. 25). "The agents masqueraded one of their own as Ensign Muns' brother to play upon LeBrun's vulnerable emotional state and empathy for other cancer victims." (*Id.*). "Agent Hughes had told LeBrun in November 1999 that Muns' brother has 'advanced cancer,' was living on 'borrowed time,' and his goal was to learn his brother's fate before he died." (*Id.*, at p. 15, para. 55). "At the time he met Muns' 'brother,' LeBrun was himself recovering from a bout with colon cancer in the previous year." (*Id.*).

VIII. REASONS FOR GRANTING THE WRIT

A. Inconsistency between the Eighth Circuit determination of custody for purposes of a *Miranda* warning and *Oregon v. Mathiason*, 429 U.S. 492 (1977)

The Eighth Circuit En Banc totally dismissed the reasoning of the District Court in finding that coercive aspects of the police conduct in this case contributed to the finding of custody. The Eighth Circuit En Banc simply disregarded facts the District Court considered as bearing on the custody issue, such as the facts that LeBrun was interviewed in a small, windowless room in a police station, that the authorities admittedly used deceptive interview tactics, that the interview was designed to produce incriminating responses as evidenced by enlarged photographs on the wall,

including photographs of Mr. LeBrun's wife and home, and that the agents falsely trumped up the evidence they claimed to possess.

The Court En Banc unconvincingly tried to distinguish this Court's opinion in *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). In *Mathiason*, an officer investigating a burglary interviewed the defendant inside the police station. During the interview, the officer falsely told the defendant that the police had discovered his fingerprints at the scene of the crime. The Oregon Supreme Court found custody. This Court reversed. In *Mathiason*, the officer left a message for the defendant asking him to call. The defendant walked over to the police station himself and eventually confessed. The present case presents far different circumstances than *Mathiason*. Here, defendant was surprised at his workplace by officers who asked him to accompany them to the station. The officers would not agree to defendant's request to drive himself. The District Court correctly found that LeBrun was dependent on the officers for a ride home. A reasonable person, confronted by uniformed police officers at his workplace asking him to get into a police car and ride with them to the station for questioning, would not reasonably believe that he was free to decline such a request.

The District Court, in finding custody, distinguished *Mathiason* on the facts found. The District Court found three important distinctions. First, LeBrun did not have unrestrained freedom of movement during his interrogation. Second, LeBrun was not given the opportunity to decide when and where he would be interviewed. Third, the atmosphere surrounding LeBrun's interrogation was different from *Mathiason's*.

In *Mathiason* and *Jorgensen* the questioning took

> place amid surroundings that felt more like office buildings than police stations. The place of interrogation here, however, was a Highway Patrol building. Additionally, once inside the Highway Patrol building the agents questioned LeBrun in a room that felt like an interrogation room; indeed, it felt that way because it *was* an interrogation room. It had a one-way mirror, no windows, little furniture, props attached to the walls, and the agents were firmly in control. The Court also notes that the agents admitted that they wanted the questioning to feel like a formal interview. Consequently, unlike in *Mathiason* and *Jorgensen*, there was nothing in the atmosphere here which would suggest to a reasonable person that he was doing something other than undergoing a custodial interrogation.[3]

The testimony presented at the hearing held on April 27, 2001, established that the NCIS agents carefully planned out the interrogation of LeBrun on September 21, 2000. The plan included having agents pick LeBrun up at his place of work and drive him to the interrogation site in a police car. LeBrun, when questioned by NCIS agents in 1999, had always before driven himself to the location of the interview in his own car. Special Agent Early admitted in his testimony on April 27, 2001, that this procedure gave the agents more "control" over the defendant. Both law enforcement agents were armed. Defendant was aware that one of the officers was armed because he saw his gun under his coat.

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[3]District Court's Order, November 16, 2001, page 22. *United States v. Jorgensen*, 871 F.2d 725 (8th Cir. 1989).

At least two weeks prior to the September 21, 2000 interview, Agent Hughes and other agents, including Early and Grebas, engaged in "quite a bit" of planning for how the next interview would be conducted. (Govt. Add-2, p. 6, para. 13 (Order of November 16, 2001); Doc. 64; Tr. 44). Although he had cooperated with the agents and voluntarily appeared for questioning several prior times in the prior year, the NCIS agents decided not to give Mr. LeBrun any notice of the planned interrogation. (Govt. Add-2, p. 6, para. 17; Tr. 44-45). The agents wanted the interrogation to have the feel of a "formal" interrogation. (*Id.*). The NCIS had Muns' sister fly in for the September 21, 2000, interrogation from out of state. (Govt. Add-2, p.7, para. 20, p.33-34; Tr. 62-63-169). The government admitted paying for her travel expenses to the Kansas City area. (*Id.*). Also, four NCIS agents flew in from out of state to be present for the interrogation. Mr. LeBrun was not told of the purpose for which he was needed at the Highway Patrol station except that no member of his family had been injured. Since Mr. LeBrun was picked up by a Missouri State Highway Patrolman in a highway patrol car, and since NCIS Special Agent Early did not identify himself until defendant was actually in the interview room at the station, it was certainly not obvious that the Muns matter was the subject of inquiry.

The NCIS agents did not simply overlook *Mirandizing* Mr. LeBrun, they had specifically predetermined that he would not be given *Miranda* warnings, as each agent separately admitted in their testimony at the suppression hearing. It is clear from the hearing on defendant's motion that the NCIS agents carefully planned the September 21 encounter with Mr. LeBrun to be the functional equivalent of a custodial interrogation. The District Court found that "the cumulative effect of the agents' words and demeanor was to make a reasonable person feel like the questioning would

continue until he confessed." (Govt. Add-2, p. 23).

In *United States v. Hanson*, 237 F.3d 961, 962 (8th Cir. 2001), the Eighth Circuit emphasized several important factors as indicating that the defendant had been deprived of his freedom of movement. The District Court noted that the defendant had been driven to the interrogation site in the back of a locked police vehicle. The court stated that this made the defendant dependent on the police for transportation back home. The court noted that the interrogators threatened the defendant with going to federal prison if he did not cooperate by making a statement about the attempted arson investigation. The court held that custody occurs not only upon formal arrest, but also under "any other circumstances where the suspect is deprived of his freedom of movement." *Hanson*, at 963. The court further held that, in determining whether a suspect is in custody, "we must consider the 'totality of the circumstances,' and 'how a reasonable man in the suspect's position would have understood his situation.' " *Id.* (quoting *Berkemer v. McCarty*, 468 U.S. at 422). "Ultimately, however, the determination of custody 'depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id. Hanson* identified a number of relevant factors in determining whether the defendant was in custody while being interrogated: (1) the length of the interrogation; (2) the suspect's freedom to leave the scene; and (3) the place and purpose of the interrogation.

Hanson indicated that an officer's evolving suspicions about the complicity of a suspect does not automatically convert an interview into a custodial interrogation. However, *Hanson* noted that when an investigator communicates his suspicions during the course of an interrogation, this fact can be relevant as to how a reasonable individual would "gauge

the breadth of his or her 'freedom of action.'" *Id.* at 965. During the interview, the NCIS agents unequivocally advised LeBrun that they knew that he had killed Muns. The agents threatened LeBrun with prosecution for first degree murder and prison for life. Although Special Agent Early advised LeBrun that he was free to leave at the outset of the interview, LeBrun's sense of freedom surely had to significantly diminish as the accusatory interrogation progressed. *Hanson* recognizes that an interrogation can play out so as to "diminish" a suspect's initial sense of freedom of movement. The District Court correctly found that "the cumulative effect of the agents' words and demeanor was to make a reasonable person feel like the questioning would continue until he confessed." (Govt. Add-2, p. 23).

It is also clear that "deceptive stratagems" were used by NCIS agents in LeBrun's interrogation, which under *Hanson* further diminishes an accused's sense of freedom of movement. LeBrun was falsely told that other shipmates had incriminated him. He was given false legal advice by the NCIS agents, which advice failed to account for the continuing viability of a charge of felony murder under 18 U.S.C. Section 1111. In *Miranda*, this Court specifically referred to the giving of false legal advice as constituting a "deceptive strategem." *Miranda v. Arizona*, 384 U.S. 436, 456 (1966).

The District Court cited the government's use of an agent to impersonate Muns' brother as a deceptive stratagem. (Govt. Add-2, p. 25, 33-34). "The agents masqueraded one of their own as Ensign Muns' brother to play upon LeBrun's vulnerable emotional state and empathy for other cancer victims." (Id, at p. 25). "Agent Hughes had told LeBrun in November 1999 that Muns' brother had 'advanced cancer,' was living on 'borrowed time,' and his goal was to learn his

brother's fate before he died." (*Id.*, at p. 15, para. 55). At that time, defendant, himself, was recovering from a recent bout with colon cancer. (*Id.*).

NCIS agents then used "strong arm tactics or deceptive strategems" to intimidate and confuse Mr. LeBrun further. As the videotape clearly indicates, the atmosphere of the interrogation room was clearly "police dominated." As the videotape and transcript reveal, Special Agent Grebas threatened LeBrun with prosecution for first degree murder, financial ruin, loss of his home and family, personal disgrace, and unfavorable national publicity. Mr. LeBrun's freedom of movement was in fact restricted on September 21, 2000, and that is the way he perceived it. In effect, he was subjected to a custodial interrogation.

Defendant was advised by agents on five separate occasions during the interview that he would be going home that day–at the conclusion of the interview. (E-2, pp. 13, 20, 22, 77, 81). The clear implication of these statements was that Mr. LeBrun was not going to be allowed to go home until the completion of the interview to the NCIS agents' satisfaction.

> You know what? When you say, 'You know what Special Agent EARLY, I killed him.' You know what. We can stop. Because you know why, you can say this, it wasn't premeditated. It was spontaneous. That's all you need to say and we are done. We've got all the why.

(Exhibit E-2, p. 15) (emphasis added).

During this time period, Special Agent Early stated to LeBrun that "[y]ou can put an end to this today." (Exhibit E-

2, p. 14). The clear message in these statements was that LeBrun was not going to be allowed to go home until the completion of the interview to the agents' satisfaction.

The District Court in finding custody persuasively distinguished *Mathiason* on the facts found. The District Court found three important distinctions. First, Mr. LeBrun did not have unrestrained freedom of movement during his interrogation. Second, Mr. LeBrun was not given the opportunity to decide when and where he would be interviewed. Third, the atmosphere surrounding Mr. LeBrun's interrogation was different and far more inherently cooercive than *Mathiason's*. Defendant's interrogation by NCIS agents on September 21, 2000, was effectively a custodial interrogation. The Eighth Circuit En Banc simply could not reasonably say that the District Court's underlying factual findings were clearly erroneous. The Opinion of the Eighth Circuit En Banc in this case is an unwarranted and unjustified extension of this Court's teaching in *Mathiason*. This Court should grant *certiorari* and reverse the Eighth Circuit En Banc with respect to the issue of *Miranda*.

B. Misapplication of the totality of circumstances to a determination of voluntariness of Defendant's admissions to NCIS agents

The Eighth Circuit En Banc effectively eliminates the traditional American requirement of voluntariness in confessions. The government argued and the Opinion of the court illustrates that in the Eighth Circuit there can simply be no involuntary confession by a person who is *compos mentis* in the absence of physical coercion by the police. The District Court in this case wrote a 34 page opinion condemning the tactics used in the present case in the strongest possible terms. The District Court found material lies, illegal threats, illegal

promises and the violation of virtually every known and established rule governing acceptable police interrogation. The Eighth Circuit blithely ignores the findings of the District Court and the case law and defines its own standard for voluntariness. A finding of an involuntary confession in the case of a normal person will simply not be made in the Eighth Circuit. A normal person with any modicum of education is conclusively presumed by the Eighth Circuit to be capable of resisting any possible lie, threat, promise or gambit. Not even a specific promise not to prosecute the defendant inducing a confession, as occurred here, is enough to support a finding of an involutary confession. Why should the police be immune from the basic rules of conduct applicable to every other area of American life? In a civil setting, the investigators' conduct here would clearly amount to extortion, fraud and breach of contract.

The real rule operative in the Eighth Circuit is that a defendant must be mentally defective or the victim of torture in order for that court to find an involuntary confession. The present opinion brutalizes two hundred years of established American law in a quest to make certain that Mr. LeBrun does not escape punishment for this alleged 36 year old crime. This Court should accept *certiorari* in this case to reestablish the basic requirement of American law that a confession, to be admissible, must be voluntary, the product of a knowing and voluntary act on the part of the defendant. Threats, lies, deception and a promise of non-prosecution were simply ignored by the Eighth Circuit. Three different levels of federal courts found the conduct of the Navy investigators not only illegal in this case but reprehensible. This Court should not countenance the perversion here of all possible concepts of Due Process and fundamental fairness.

All of LeBrun's statements were induced by coercion,

threats and illegal inducements. NCIS agents intentionally did not read Mr. LeBrun his *Miranda* rights after picking him up on September 21, 2000. This was a conscious decision the agents made during a previous strategy session. The failure to advise a suspect of his rights is one factor that indicates an involuntary confession. *United States v. Mendoza*, 85 F.3d 1347, 1350 (8th Cir. 1996). Therefore, all such statements were involuntarily made and properly suppressed.

On September 21, 2000, the authorities "had nearly complete control over the interrogation." (Govt. Add-2, p. 30, 33-34 (Order of November 16, 2001)). The District Court noted that "the government does not dispute that the agents choose (sic) the time and place of the interrogation, manipulated the atmosphere in the room, and then 'totally dominated the conversation' during the interrogation." (*Id.*).

The agents repeatedly lied to defendant about the evidence implicating him in the death of Muns. The agents told the defendant there was "absolutely no doubt" about his guilt, that they knew he was "responsible" for Muns' death, and that the "only question" was whether his actions were "premeditated or spontaneous."

The agents repeatedly threatened defendant. The agents said the U.S. Attorney for Alaska was ready to charge him with premeditated murder, which was untrue. They informed him that he would be extradited and tried there unless he admitted to a "spontaneous murder." Defendant was told that such a trial would "leave his pregnant wife alone, drain his family's finances, ruin his reputation, and ruin his family's reputation." The agents also told defendant that the decedent's family would file a civil suit and ruin his family's name. Defendant was told that his family would be ruined publicly in a manner similar to the Jon-Benet Ramsey case.

(*Id.*, at p. 11, para. 38, p. 33-34; (E-2, at p. 12, 13, 17)).

The District Court was disturbed by the NCIS agents' use of the "good cop/bad cop" or "Mutt and Jeff" interrogation technique, in which Agent Early was clearly the "good cop" and Agent Grebas was clearly the "bad cop." (Govt. Add-2, P. 32-34). The District Court also faulted the investigators for using the "blame the victim" technique in which they tried to suggest that defendant had resented Muns as a brand new officer put in charge of him in the office. (*Id.*).

After threatening defendant repeatedly with everything they could think of, and after repeatedly lying to him about the strength of the evidence against him, and after falsely advising defendant that he was about to be indicted for "premeditated murder" in the District Court of Alaska, the agents told defendant that if he admitted to a "spontaneous" killing, that would be the end of it because the statute of limitations for manslaughter had expired. (Govt. Add-2, p. 10-11). Based on the agents' statements, defendant *believed* that he would not be prosecuted if he confessed to a "spontaneous" killing of Muns. (*Id.*, at p. 31, 33-34).

Illegal inducements were made to defendant by NCIS agents in order to induce defendant to make incriminating out-of-court admissions. Defendant was told that the statute of limitations had run out on a "spontaneous" killing and that he would not be prosecuted if he admitted that Muns was killed by him "spontaneously." Defendant was advised that he would only be prosecuted if he falsely denied having knowledge of the circumstances surrounding the disappearance of Muns. Only thereafter did defendant make incriminating admissions to the agents.

Defendant's subsequent admissions were clearly the

product of illegal threats and inducements. Defendant's out-of-court admissions were therefore not voluntary and not admissible under the Due Process Clause of the United States Constitution.

A confession must not be obtained by any direct or implied promises, however slight. *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981). A confession induced by a promise to confer a benefit upon the accused is involuntary. *Hardy v. United States*, 186 U.S. 224 (1902); *Mangum v. United States*, 289 F. 213 (9th Cir. 1923). Where a promise of leniency has been made in exchange for a statement, an inculpatory statement would be the product of inducement and therefore not an act of free will. *Griffin v. Strong*, 983 F.2d 1540 (10th Cir. 1993).

A review of the videotapes made by the NCIS confirms that its agents violated defendant's Due Process rights by inducing admissions by making illegal threats and inducements for defendant to cooperate and waive his Fifth Amendment right not to incriminate himself. As set out above in the Statement of the Case, in response to defendant's specific inquiry, Special Agents Grebas and Early advised defendant that he would not be prosecuted if he admitted to a "spontaneous" homicide of Ensign Muns.

Certain promises, if not kept, are so attractive that they render a resulting confession involuntary. A promise of immediate release or that any statement will not be used against the accused is such a promise. *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987). Military criminal law incorporates the voluntariness standard through Article 31(d), UCMJ, 10 U.S.C. Section 831(d), which prohibits the use of any confession that was obtained "through the use of coercion, unlawful influence, or unlawful inducement."

United States. v. Lonetree, 35 M.J. 396, 400 (C.M.A. 1992).

The principal constitutional authority on unlawful inducements is *Bram v. United States*, 168 U.S. 532 (1897). The *Bram* court quoted with approval from 3 Russell on Crimes 478 (6th Ed.):

> But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

68 U.S. at 542-43 (emphasis added).

Where an admission or confession is procured as the product of inducements reasonably engendering either hope or fear, the accused is deprived of his freedom of will, and his confession becomes involuntary. *United States v. Monge*, 2 C.M.R. 1, 5 (C.M.A. 1952), *United States v. Webb*, 2 C.M.R. 125 (C.M.A. 1952). This is particularly true when the hope of immunity is inspired by persons of seemly authority or believed by the accused to be such persons competent to effectuate such immunity. *United States v. Knooihuizen*, 16 C.M.R. 573 (1954).

The District Court ruled as follows: "The Court accepts the magistrate's findings, except those pertaining to the

promise of nonprosecution. The Court finds that LeBrun *believed* he would not be prosecuted if he confessed to a 'spontaneous' murder. The Court does not make any finding as to what–if any–promise was actually made, or what the legal effect of any promise is." (Govt. Add-2, page 31-32).

The District Court found that defendant *believed* that he would not be prosecuted if he admitted to a "spontaneous" killing of Muns. Defendant is not here contending that the government does not have the power to indict him for murder, spontaneous or otherwise. Defendant merely contends that, if the government chooses to indict the defendant based on admissions induced by a promise which was understood by defendant to be a promise of non-prosecution, then such admissions have to be deemed involuntary and therefore inadmissible. For all practical purposes, the District Court's finding on this issue is equivalent to the Magistrate's finding.

The District Court found that, although some of the NCIS agents' tactics might have been acceptable if used individually and "sparingly," "they may not combine them en masse as they have here." (Govt. Add-2, p. 33). It concluded that "[t]his rule makes sense, if the law were otherwise then the conduct of the agents here would case a shadow over the vast majority of confessions which are voluntary and which are given to law enforcement agents who use such psychologically coercive tactics sparingly, if at all."(*Id.*). "A totality of the circumstances analysis does not permit [the authorities] to cherry-pick cases that address individual potentially coercive tactics, isolated on from the other, in order to insulate themselves when they have combined all of those tactics in an effort to overbear an accused's will." *Wilson v. Lawrence County*, 260 F.3d 946, 953 (8th Cir. 2001)(as quoted by the District Court).

The Eighth Circuit, while it purports to use a totality approach, and mentions various factors it considers in determining voluntariness, in effect actually uses a two-factor approach to determine voluntariness of a confession: whether the authorities used physical coercion in extracting the confession, and whether the accused lacked the intelligence, education, or mental ability to resist the coercion and thus there occurred an overbearing of the accused's will. As the government pointed out in its Petition for Rehearing En Banc, the Eighth Circuit has rarely, if ever, found a confession to be involuntary where there was no physical coercion and the suspect was not mentally challenged. (Government's Petition for Rehearing *en banc*, p.12). In analyzing the circumstances surrounding LeBrun's admissions, the Eighth Circuit stated, "Generally, we have concluded that where the defendant possessed at least average intelligence, then his inculpatory statements were not compelled." *United States v. LeBrun*, App. 1. Thus, for all intents and purposes, if the Eighth Circuit finds that the accused possessed the intelligence, education, or mental ability to resist the coercion (the person was found to be "normal"), the Eighth Circuit consistently holds that the police conduct at issue was not sufficient to render the confession involuntary.

The defendant was questioned on September 21, 2000 by NCIS agents. At the time of the interrogation, LeBrun was recovering from colon cancer. The agents specifically played off this fact by telling LeBrun that the agent posing as the deceased's brother had "advanced cancer" and that he was living on "borrowed time." As the District Court correctly stated, "The agents masqueraded one of their own as Ensign Muns' brother to play upon LeBrun's vulnerable emotional state and empathy for other cancer victims." (App. 80). The agents also knew that LeBrun's wife was pregnant at the time of the interrogation, and told LeBrun that a trial would "leave

his pregnant wife alone, drain his family's finances, ruin his reputation, and ruin his family's reputation." The agents told him that the victim's family would file a civil suit and ruin his family's name, and that his family would be ruined, like Jon Benet Ramsey's family was ruined by the media attention. (E-2, p. 4-7, 10-13, 17). The District Court concluded that, "The Court finds that LeBrun was particularly vulnerable to psychological pressure concerning his pregnant wife, his family, and his health." (App. 84).

The agents had "nearly complete control over the interrogation." (Govt. Add-2, p. 30). Defendant was advised that agents suspected him of being involved in the "spontaneous" homicide of Muns. He was threatened with immediate prosecution for premeditated murder in the District of Alaska, which he was advised would ruin him and him family, financially and socially.

Defendant was repeatedly advised that the statute of limitations had run out on "spontaneous" homicide and he was repeatedly assured that the Navy was not interested in prosecuting but rather in solving the mystery of Muns' disappearance. He was warned that the only way he could get in trouble was to make false statements about his knowledge of the circumstances surrounding Muns' disappearance. The agents specifically assured defendant that he would not be prosecuted if he admitted to a "spontaneous" homicide.

Taken altogether, the clear threats, coercion and illegal inducements made in a police-dominated atmosphere, served to overbear defendant's will and produce an illegal and involuntary confession. (Govt. Add-2).

C. Misapplication of the totality of circumstances to a determination of voluntariness of Defendant's

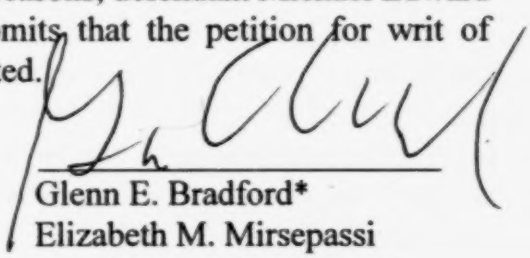
statements to decedent's sister

The government concedes in part III of its brief (p.40) that defendant's September 21, 2000, statements to Muns' sister, acting as a government agent, must be suppressed if the previous statements to the NCIS agents are found to be involuntarily made or made while in custody without *Miranda* warnings being given. Defendant agrees with the government's analysis. *United States v. Pierce*, 152 F.3d 808 (8th Cir. 1998); *Wong Sun v. United States*, 371 U.S. 471 (1963).

The District Court correctly ruled that all out-of-court admissions made on September 21, 2000, by defendant to NCIS agents, including Muns' sister, should be suppressed. Defendant was "in custody" at the time of his interrogation by the agents. The agents failed to read defendant his *Miranda* rights. Additionally, the admissions made by defendant were involuntary in that they were procured by threats, coercion, and illegal promises. For these reasons, defendant's admissions must be suppressed. The District Court effectively ruled that Muns' sister was acting as an agent of the government on September 21, 2000, so that any statements made to her must also be suppressed.

IX. CONCLUSION

For the above stated reasons, defendant Michael Edward LeBrun respectfully submits that the petition for writ of certiorari should be granted.



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APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-4005

United States of America, *
*
Appellant, *
v. *
*
Michael Edward LeBrun, *
*
Appellee. *

Submitted: April 16, 2003
Filed: April 9, 2004

Before LOKEN, Chief Judge, McMILLIAN, BOWMAN, WOLLMAN, HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, MELLOY, and SMITH, Circuit Judges.

HANSEN, Circuit Judge.

After thirty-three minutes of questioning, Michael LeBrun confessed to naval investigators that in 1968, while he was enlisted in the United States Navy, he strangled to death his superior officer, Ensign Andrew Muns, on board the U.S.S. Cacapon after Ensign Muns caught LeBrun robbing the safe in the ship's disbursing office. The district court suppressed

the confession on the ground that it was obtained in violation of LeBrun's Fifth Amendment privilege against self-incrimination as construed in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and on the ground that it was coerced, and thus obtained in violation of LeBrun's due process rights. The government appealed, and a divided panel of this court affirmed the judgment of the district court. *See United States v. LeBrun*, 306 F.3d 545 (2002). We granted the government's petition for rehearing en banc, vacated the panel opinion, and for the reasons stated below, now reverse the judgment of the district court.

I.

Muns and LeBrun served as shipmates during the Vietnam War aboard the U.S.S. Cacapon. Ensign Muns served as the disbursing officer, and LeBrun served as the disbursing clerk. On January 16 or 17, 1968, while the U.S.S. Cacapon was moored in the Subic Bay, Muns disappeared. After conducting an investigation into Muns' disappearance, the Navy concluded that Muns had stolen $8600 from the disbursing office and had deserted. Thirty years later, still unconvinced of her brother's wrong-doing, Muns' sister convinced Special Agent Peter Hughes of the Naval Criminal Investigative Service ("NCIS") Cold Case Homicide Unit to reopen the investigation.

In the fall of 1999, NCIS agents conducted four interviews with LeBrun. On each of these four occasions, LeBrun cooperated with the investigators and voluntarily answered questions regarding Muns' disappearance. On three of these occasions, *718 he was given his *Miranda* warnings by the interviewers. During an interview conducted on November 20, 1999, LeBrun told NCIS agents that he realized that he may have been involved in the death and disappearance of

Ensign Muns. LeBrun also told the agents that he felt that he had repressed memories, and he asked Agent Hughes if he knew of a therapist who could help LeBrun recover those memories. After completing the first round of interviews, the NCIS agents did not have any further significant contact with LeBrun for approximately ten months as they continued to investigate other leads. By September of 2000, however, the NCIS had focused on LeBrun as the lead suspect in the case. At that time, NCIS agents decided to interview LeBrun again.

On September 21, 2000, NCIS Special Agent Early and Corporal Hunter of the Missouri Highway Patrol arrived unexpectedly at LeBrun's place of employment. Hunter told LeBrun that he and Early were conducting an investigation and requested that LeBrun accompany them to the Missouri Highway Patrol office to participate in an interview. Although the officers did not tell LeBrun the subject of their investigation, LeBrun agreed to accompany the officers because he thought that the officers might be investigating certain criminal allegations concerning LeBrun's employer. At the officers' suggestion, LeBrun rode in the front seat of an unmarked patrol car to the station house. The door was unlocked during the trip, and LeBrun was not restrained in any manner.

After they arrived at the patrol office, but before they went inside, Agent Early told LeBrun that he was not under arrest, that he was free to terminate the impending interview at any time, and that he was free to leave at any time. He was also told that he was subject to audio and visual recording anywhere inside the building. The officers then took LeBrun inside the office to a windowless interview room. The authorities had prepared the room prior to LeBrun's arrival, adorning the interview room walls with enlarged photographs of scenes from LeBrun's life. After LeBrun took a seat, NCIS

Agents Early and Grebas identified themselves and initiated the interview. At no point immediately prior to or during the September 21, 2000, interview did the agents recite to LeBrun the *Miranda* warnings. The district court found that the decision not to warn was a conscious one made by the interviewers. Special Agent Early testified that no warning was thought necessary because it was not an under arrest custodial situation.

Despite the agents' failure to recite the *Miranda* warnings, LeBrun testified at the suppression hearing that at the time of the interview he understood what his *Miranda* rights were. LeBrun also testified that at the time the interview commenced he believed that he was not in custody and that he was free to leave at any time. The government concedes that the officers used psychological ploys during the course of the interview to facilitate a confession. For example, the agents told LeBrun that he was the prime suspect in Muns' death and that they had significant evidence establishing that LeBrun was the killer. The agents also told LeBrun that a protracted trial in a distant district would drain his financial resources and would ruin his family's reputation. At no point, however, did the agents shout at LeBrun or use physical force against him. After approximately thirty-three minutes of questioning, LeBrun confessed to the crime. LeBrun explained that while he was robbing the safe, Ensign Muns walked into the disbursing office. He confessed that he rushed Muns and killed him by strangling him and then smashing his head *719 against the deck of the disbursing office. At the agents' urging, LeBrun then physically reenacted the robbery and attack. He also explained how he had dumped Muns' body and the missing money into a tank of caustic fuel oil to dispose of the evidence.

After LeBrun confessed to the killing, Agents Early and

Grebas asked whether he wanted to apologize to Muns' sister, Mary Lou Taylor, who had flown in from Milwaukee to assist in the interrogation if it became necessary. He indicated that he did. Dr. Taylor, accompanied by Agent Billington, who was posing as Muns' brother and whom the agents had told LeBrun was stricken with cancer, then entered the interview room. LeBrun acknowledged to Taylor and Billington that he was responsible for Muns' death, and he apologized. After the agents had completed their questioning, LeBrun consented to having his house searched. LeBrun then withdrew a cellular telephone from his pocket and called his spouse. The agents drove LeBrun to his house and searched it. After conducting their search, the officers left LeBrun at home. They did not arrest him that day.

LeBrun was arrested at a later date and charged with felony murder in violation of 18 U.S.C. § 1111. He moved to suppress his confession, arguing that it was obtained in violation of *Miranda v. Arizona* and in violation of his due process rights. The district court agreed with LeBrun, concluding that he was "in custody" within the meaning of *Miranda* or, in the alternative, that his confession was coerced. The district court granted the motion to suppress, the government appeals, and we reverse the judgment of the district court.

II.

A.

Before turning to the merits of the district court's "in custody" determination, we must first resolve an intracircuit split concerning the standard of review we apply to such a determination. In *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), the Supreme Court held

that federal habeas courts should review de novo state courts' "in custody" determinations. It seems clear to us that *Thompson's* rationale requires that on direct appeal we review the district court's custody determination de novo. *See id.* at 112-13, 116 S.Ct.457 (stating that the ultimate "in custody" determination is a mixed question of fact and law calling for independent review). After *Thompson*, however, we have reviewed district court custody determinations de novo in some cases and for clear error in others. *Compare United States v. Axsom,* 289 F.3d 496, 500 (8th Cir. 2002) (applying de novo review), *with United States v. Hanson,* 237 F.3d 961, 963 (8th Cir. 2001) (applying clear error standard of review); *see also United States v. McKinney,* 88 F.3d 551, 554 n. 2 (8th Cir. 1996) (applying clear error standard of review but noting that it may be reconsidered in light of *Thompson).* As Judge Riley explained in *Axsom,* post-*Thompson*, our sister circuits have reviewed de novo the "in custody" determination. *See Axsom,* 289 F. 3d at 499-500 (compiling cases). We are of the view that this is the better approach. Accordingly, we hold that "in reviewing 'in custody' determinations, we uphold findings of historical fact unless clearly erroneous, but we apply the controlling legal standard to the historical facts utilizing an independent review." *Id.* at 500. Our cases to the contrary are overruled.

B.

The Fifth Amendment provides that no person "shall be compelled in any *720 criminal case to be a witness against himself." U.S. Const. amend. V. Under traditional understandings, courts enforced the Fifth Amendment privilege by requiring the government to establish the voluntariness of a confession before it could be admitted into evidence against a criminally accused Miranda, however, "changed the focus of much of the inquiry in determining the

admissibility of suspects' incriminating statements." *Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). The *Miranda* Court "concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself." *Id.* at 435, 120 S.Ct. 2326 (internal marks omitted). To better protect this privilege, the *Miranda* Court created concrete constitutional guidelines which "established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with" certain warnings. *Id.* "[T]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602. Not every confession obtained absent the *Miranda* warnings is inadmissible, however, because "police officers are not required to administer *Miranda* warnings to everyone whom they question." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Id.*

The "ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)(per curiam) (internal marks omitted). "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation;

and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112, 116 S.Ct. 457 (footnote omitted). Thus, the critical inquiry is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant's "freedom to depart was restricted in any way." *Mathiason*, 429 U.S. at 495, 97 S.Ct. 711. In answering this question, we look at the totality of the circumstances while keeping in mind that the determination is based "on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 322-23, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). After looking at the totality of the circumstances, we conclude that the district court erred in concluding that LeBrun was "in custody" within the meaning of *Miranda*.

We begin our analysis by discounting those facts that, in our view, bear little on the custody determination. First, it cannot be disputed that the warnings were not required here "simply because the questioning [took] place in the station house." *Mathiason*, 429 U.S. at 495, 97 S.Ct. 711. Second, we are of the view that the purportedly coercive aspects of this particular *721 interview are largely irrelevant to the custody determination and that the district court erred in giving such great weight to certain facts, chiefly: that LeBrun was interviewed in a small, windowless room; that the authorities admittedly used deceptive interview tactics; that the interview was designed to produce incriminating responses as evidenced by the enlarged photographs on the wall; and that the agents falsely trumped up the evidence they said they possessed.

In *Mathiason*, an officer investigating a burglary

interviewed the defendant for thirty minutes in a small, windowless interrogation room inside the police station. During the course of the interview, the officer told the defendant that he was a suspect and falsely told the defendant that the police had discovered his fingerprints at the scene of the crime. The Supreme Court of Oregon concluded that the coercive aspects of the interview rendered the defendant in custody, thereby necessitating the warnings. The Supreme Court reversed, concluding that "a noncustodial situation is not converted to one in which *Miranda* applies simply because the questioning took place in a 'coercive environment.' " *Mathiason*, 429 U.S. at 495, 97 S.Ct. 711. It continued, stating that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Id.* Finally, the Court concluded that the officer's false statement that the police had evidence against the defendant had "*nothing* to do with whether [the defendant] was in custody for purposes of the *Miranda* rule." *Id.* at 496, 86 S.Ct. 1602 (emphasis added).

In *California v. Beheler*, the Court revisited the issue of station house interviews. There, after being told that he was not under arrest, Beheler agreed to accompany the authorities from a crime scene to the police station for questioning. The authorities did not read Beheler the *Miranda* warnings before the interview started, and during the course of the interview, Beheler made incriminating statements. The authorities released Beheler and then arrested him several days later. The California Court of Appeals reversed Beheler's conviction, holding that the interview constituted custodial interrogation. In support of its conclusion that Beheler was "in custody," the court relied on facts similar to those on which the district court in this case relied: "that the interview took place at the

station house, that before the station house interview the police had already identified Beheler as a suspect in the case because Beheler had discussed the murder with police earlier, and that the interview was designed to produce incriminating responses." *Beheler*, 463 U.S. at 1123, 103 S.Ct. 3517. The Supreme Court reversed, concluding that "[i]t is beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action. Indeed, Beheler's freedom was not restricted in any way whatsoever." *Id.*

Mathiason and *Beheler* teach us that some degree of coercion is part and parcel of the interrogation process and that the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart. *See Mathiason,* 429 U.S. at 495, 97 S. Ct. 711; *see also Stansbury,* 511 U.S. at 324-25, 114 S. Ct. 1526 (stating that an officer's suspicion regarding a defendant and purpose for conducting an interview bear on the custody determination "only if the officer's views or beliefs ... would have affected how a reasonable person in that position *722 would perceive his or her freedom to leave").

Whatever coercion existed in this case was not of the sort that a reasonable person would perceive as restricting his freedom to depart. Indeed, the facts support the opposite conclusion. LeBrun was never physically restrained. He was never placed in handcuffs. The agents told LeBrun before the interview commenced that he was free to leave. LeBrun testified that he understood that he was free to terminate the interview and leave at any time. LeBrun had his cellular phone with him during the interview, and he called his wife from the interview room. While the mere possession of a cellular phone without more will not transform a custodial interrogation into a noncustodial one, it is relevant to the

question of whether the interview was coercive and whether a reasonable person in the same circumstances would feel restrained. See *United States v. Unser*, 165 F.3d 755, 766 (10th Cir.) (noting that use of a cellular phone during an interview is a factor supporting a finding of no custody), *cert. denied,* 528 U.S. 809, 120 S.Ct. 40, 145 L.Ed.2d. 36 (1999). His cellular phone provided LeBrun a line of communication between himself and the outside world and to some extent mitigated the incommunicado nature of interrogations with which the *Miranda* Court was concerned and the psychological pressure associated with being isolated in an interview room. At the end of the interview, the agents did not arrest LeBrun but instead drove him to his home. *See United States v. Galceran*, 301 F.3d 927, 931 (8th Cir. 2002) (stating that the lack of arrest was a "very important factor weighing against custody").

The facts of this case are in all relevant respects indistinguishable from *Mathiason* and *Beheler*, and they dictate the conclusion that LeBrun was not in custody within the meaning of *Miranda*. Moreover, the indicia of custody present here are no greater than and the facts weighing against custody are no less than those in a host of other cases in which we have concluded that an interview was noncustodial. In *Galceran*, two armed police officers interviewed the defendant for approximately one and one-half hours in a small, windowless, interior room in a police station. As is the case here, the officers in *Galceran* repeatedly told the defendant that he was free to leave and that he would not be arrested that day. We concluded that the defendant was not in custody because, among other things, the officers told him that he was free to leave and that he would not be arrested that day and because he was in fact not arrested at the conclusion of the interview. *See Galceran*, 301 F.3d at 930-31. In *Thatsaphone v. Weber*, 137 F.3d 1041 (8th Cir.), *cert. denied*,

523 U.S. 1130, 118 S. Ct. 1822, 140 L.Ed.2d 958 (1998), an officer conducted a closed-door, twenty-two-minute interview with the defendant at the police station. We concluded that Thatsaphone was not in custody because the officers told him that he was free to leave and because the officers did not arrest him that day. *See Thatsaphone*, 137 F.3d at 1044-46. In *Jenner v. Smith*, 982 F.2d 329 (8th Cir.), *cert. denied*, 510 U.S. 822, 114 S. Ct. 81, 126 L.Ed.2d 49 (1993), the defendant made statements to the police incriminating herself in the murder of her three-year-old daughter. Jenner made the statements during an approximately seven-hour interview conducted in a small room in the police station. During the course of the interview, an officer raised his voice on several occasions, accusing Jenner of lying. The officers also used a variety of psychological ploys to draw information from Jenner, including using religious appeals and intimating that her husband might be blaming her for the murder. We concluded *723 that the interview was noncustodial in nature: Jenner voluntarily came to the police station, the authorities advised her that she was free to leave, and she was not arrested at the conclusion of the interview. *See Jenner*, 982 F.2d at 335. In *United States v. Mottl*, 946 F.2d 1366 (8th Cir. 1991), we concluded that an interview conducted at FBI headquarters was noncustodial despite the agents' failure to inform the defendant at the outset of the interview that he was free to leave and free to terminate the interview at any time. *See Mottl*, 946 F.2d 1370.

As the analogous cases discussed above demonstrate, where there is no clear indication that the defendant's freedom to depart has been restricted, we have typically concluded that a police station interview was noncustodial. There is contrary authority, however. In *United States v. Hanson*, ATF agents arrived unannounced at Hanson's residence, awakened him, and transported him in the locked backseat of their vehicle to

the federal building for further questioning. The agents then questioned Hanson for several hours in a windowless, interior room before Hanson confessed his involvement in an attempted arson. The *Hanson* court, over a vigorous dissent, concluded that the defendant was in custody and distinguished *Mathiason* on the ground that Hanson was dependent on the authorities for transportation from the federal building and on the ground that the agents interviewed the defendant for a significantly longer period of time than did the officers in *Mathiason*. *See Hanson,* 237 F.3d at 965. We think *Hanson* is readily distinguishable from this case. First, unlike Hanson, who rode in the backseat of a locked vehicle, LeBrun's freedom of movement was never restricted in any way. Second, the interview at issue here was of shorter duration. Third, LeBrun was not dependent upon the authorities for transportation from the Highway Patrol Station. LeBrun retained possession of his cellular phone during the entire interview, he was free to make and receive calls during the interview, and he could have easily arranged for alternative transportation by calling a coworker, a friend, a relative, his spouse, or even a taxicab.

Even if *Hanson* were not distinguishable, we are disinclined to follow it, for we are of the view that it is inconsistent with *Mathiason* and *Beheler,* and that it was wrongly decided for the reasons articulated in the dissenting opinion in that case. Accordingly, we overrule *Hanson.*

Finally, an important fact present in this case but absent, or at least not discussed, in the aforementioned cases militates against a finding of custody. In our objective custody analysis, the relevant inquiry is not whether any random reasonable person would have determined that he was in custody, but whether a reasonable person in the *defendant's position* would have considered his freedom of action restricted to the degree

associated with a formal arrest. *Feltrop v. Bowersox*, 91 F.3d 1178, 1181 (8th Cir.1996), *cert. denied,* 520 U.S. 1242, 117 S.Ct. 1849, 137 L.Ed.2d 1051 (1997). LeBrun's age; work experience; education, specifically his legal training; and his past experience with NCIS agents weigh against custody. *See United States v. Rorex*, 737 F.2d 753, 756 (8th Cir.1984) (stating that the age and experience of the interviewee is a relevant factor in the custody determination). LeBrun is in his mid-fifties. He is a military veteran and is gainfully employed as a manager in a real estate office. He has a college education and has completed one year of law school. In short, LeBrun is an educated, sophisticated individual. More important, LeBrun had past experience and dealings with NCIS investigators. NCIS agents interviewed LeBrun on four different occasions. Significantly, in none of the prior interviews *724 was LeBrun placed under arrest. Thus, on this occasion, after learning that the interviewers were NCIS agents, LeBrun could draw upon his experiences with other NCIS agents to conclude that he would not be arrested here. LeBrun would have no reason to disbelieve the agents when they explicitly informed him before entering the Highway Patrol Station that he was not under arrest and that he was free to leave at any time. LeBrun also would have no reason to disbelieve the agents when they told him on three separate occasions during the interview that he was free to leave and that he could go home. In fact, the district court found that at the start of the interview, LeBrun believed he could terminate the interview and leave. The fact that Agents Early and Grebas did not arrest LeBrun after the interview supports the conclusion that LeBrun was not in custody.

Mathiason, Beheler, and the above cited decisions of this court are indistinguishable from this case in all relevant respects. Thus, viewing the totality of the circumstances, we conclude that a reasonable, college-educated, and legally-

trained person who has had prior experience with the practice and procedure of a particular law enforcement organization, who willingly agreed to be interviewed, who was specifically told on four different occasions during the course of the interview that he was not under arrest and could go home, and who could easily facilitate transportation from the interview site via cellular phone would not have perceived that his freedom of action was restrained to the degree associated with formal arrest, and was therefore not "in custody."

III.

"A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self- determination." *Simmons v. Bowersox,* 235 F.3d 1124, 1132 (8th Cir.), *cert. denied,* 534 U.S. 924 (2001). Whether a confession is involuntary is judged by the totality of the circumstances. *See Wilson v. Lawrence County* , 260 F.3d 946, 952 (8th Cir.2001). The court must look at the "conduct of the officers and the characteristics of the accused." *See id.* The government bears the burden of persuasion and must prove by a preponderance of the evidence that the challenged statements were voluntary. *See United States v. Astello*, 241 F.3d 965, 966 (8th Cir.), *cert. denied,* 533 U.S. 962, 121 S.Ct. 2621, 150 L.Ed.2d 774 (2001). We review the district court's findings of fact for clear error and its legal conclusion as to whether a confession was voluntary de novo. *See id.*

The facts surrounding the confession are straightforward. LeBrun confessed to strangling Ensign Muns after only thirty-three minutes of questioning. Neither Agent Grebas nor Agent Early was armed during the interview. The agents never shouted at LeBrun or physically threatened him. The

government concedes that it used psychological pressure to facilitate a confession. The district court correctly recognized that the type of psychological pressure Agents Grebas and Early exerted on LeBrun here did not alone render his confession involuntary. *See Astello,* 241 F.3d at 967-68 (holding that tactics such as subjecting a suspect to psychological pressure, making false promises, playing on a suspect's emotions, and using his family against him did not render a confession involuntary). The district court concluded, however, that these tactics, when coupled with certain statements that Agents Early and Grebas made concerning nonprosecution, rendered LeBrun's confession involuntary. *725 The critical exchange occurred as follows:

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's [the killing of Ensign Muns] spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.

EARLY: Okay.

GREBAS: So it was, let me get this clear. It was spontaneous?

LEBRUN: Correct.

GREBAS: If this is true, then you killed him and it was over, it was over the money; is that right?

LEBRUN: I don't know what it was over. (R. at 65-66.)

The district court noted that the agents qualified their representations by stating to LeBrun that it was only "possible" that LeBrun would not be prosecuted. The district court explicitly did not "make any findings as to what-if any-promise was actually made, or what the legal effect of any promise [was]." (R. at 83-84.) Instead, the district court found only that "LeBrun *believed* he would not be prosecuted if he confessed to a 'spontaneous' murder." (R. at 83.)

Applying the facts as found by the district court to the controlling legal standard, we conclude that LeBrun's confession was not compelled because a defendant's mistaken *belief* that he could not be prosecuted does not render a confession involuntary. *See United States v. Kilgore*, 58 F.3d 350, 353 (8th Cir.1995) (stating that defendant's mistaken belief that he had been promised leniency would not render confession involuntary); *Winfrey v. Wyrick*, 836 F.2d 406, 411-12 (8th Cir.1987) (concluding that defendant's murder confession was voluntary even though defendant was encouraged to talk because of erroneous *belief* that if the shooting was accidental it would

negate an element of the offense), *cert. denied,* 488 U.S. 833, 109 S.Ct. 91, 102 L.Ed.2d 67 (1988).

Even assuming that a reasonable person would view the Agents' statements as a promise, a promise made by law enforcement "does not render a confession involuntary per se." *Simmons,* 235 F.3d at 1133; *see also Tippitt v. Lockhart,* 859 F.2d 595, 598 (8th Cir.1988) (concluding that defendant's confession was voluntary despite officers' promise), *cert. denied,* 490 U.S. 1100, 109 S.Ct. 2452, 104 L.Ed.2d 1007 (1989). A promise is merely one factor in the totality of the circumstances. *See Simmons*, 235 F.3d at 1133 (stating that a promise made by law enforcement is only one relevant consideration). Whatever the facts of an individual case, our polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination. Thus, it is not enough to show that the authorities' representations were the but-for cause of a confession. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 224, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (concluding that a but-for type analysis is inadequate because "[u]nder such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind"). Therefore, even assuming that the agents' statements could be construed as a promise and that the statements induced LeBrun's confession, our inquiry remains the same: *726 whether the facts surrounding this interview demonstrate that the authorities overbore LeBrun's will and capacity for self-determination. This is a very demanding standard, and we are of the view that the facts of this case do not rise to that level.

We have previously concluded that a promise not to seek execution or a promise not to prosecute failed to render the

confessions of similarly situated defendants involuntary. For example, in *Tippitt,* we held that the government's promise to a defendant not to prosecute him for capital murder in exchange for a confession did not render the confession involuntary in light of other facts showing that the interrogation was brief and that the defendant possessed an eleventh grade education. *See* 859 F.2d at 598. We do not think it unreasonable to assume that the psychological pressure exerted on the defendant in *Tippitt* to render a confession and thereby avoid execution would be at least as great as the psychological forces presented in this case. In *United States v. Larry*, 126 F.3d 1077 (8th Cir.1997), we held that the defendant's statement implicating himself as being a felon in possession of ammunition was voluntary even though it was induced by a promise that the defendant would not be prosecuted for a separate offense involving a drive-by shooting. *See* 126 F.2d at 1079. The facts of this case are no more compelling than those in *Tippitt* or *Larry*.

We place substantial weight on the fact that LeBrun confessed after a mere thirty-three minutes. Thus, this is not a situation where the officers wore down a defendant's will with persistent questioning over a considerable length of time. We also place significant weight on the fact that LeBrun testified that he had a subjective understanding of his *Miranda* rights at the time of the interview. *See Simmons*, 235 F.3d at 1133-34 (stating that a particularly compelling fact militating in favor of finding a voluntary confession was that defendant understood his rights). We also place substantial weight on the fact that LeBrun was a sophisticated individual with legal training. LeBrun was fifty years old at the time of the interview. He has served in the military, attended five years of college and one year of law school, and worked as a manager in a real estate office. As we have noted, "one of the key concerns in judging

whether confessions were involuntary, or the product of coercion, [is] the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne." *Wilson*, 260 F.3d at 952. Generally, we have concluded that where the defendant possessed at least average intelligence, then his inculpatory statements were not compelled. *See, e.g., United States v. Gallardo-Marquez*, 253 F.3d 1121, 1123-24 (8th Cir.) (concluding confession was voluntary where defendant was of average intelligence and had prior contact with law enforcement), *cert. denied*, 534 U.S. 1031, 122 S.Ct. 570, 151 L.Ed.2d 443 (2001); *Astello*, 241 F.3d at 968 (concluding that confession of an eighteen-year-old was voluntary where he had completed eleventh grade and possessed a capacity to understand what was being said during the interview); *Simmons*, 235 F.3d at 1134 (concluding that confession was voluntary where defendant had full scale I.Q. of 88); *cf. Wilson*, 260 F.3d at 949 n. 4 & 952-53 (finding involuntary confession where defendant was mentally retarded, his overall mental abilities were in the bottom two percent of the population, and testimony revealed that he could be "talked into anything").

In addition to possessing average intelligence, LeBrun did not display any unique sensitivity that would indicate that the agents might overbear his will. LeBrun *727 had met with NCIS investigators on four prior occasions. The videotape of the interview demonstrates that LeBrun was composed and aware of his surroundings and the circumstances confronting him. In fact, as LeBrun and the Agents discussed the potential statute of limitations problems, LeBrun became more animated and much more interested in the interview. After watching the videotape, it is apparent that LeBrun is an intelligent, calculating person who erroneously perceived a

potential loophole in the prosecution's case and tried to take advantage of it by confessing to "spontaneous" murder. Whatever his motivation, it is clear to us that LeBrun's capacity for self-determination was not impaired. Thus, the district court erred in concluding that LeBrun's confession was involuntary.

IV.

For the reasons stated above, we reverse the judgment of the district court and remand the case for further proceedings.

MORRIS SHEPPARD ARNOLD, Circuit Judge, with whom McMILLIAN, BYE, and SMITH, Circuit Judges, join, dissenting.

I pass over the question of whether Mr. LeBrun was in custody when he confessed to the murder of Mr. Muns, and go directly to the matter of whether his confession was voluntary, since I think that the case can be resolved rather quickly and easily on that ground. Because it appears to me that Mr. LeBrun's confession was the product of an overborne will, I would affirm the district court. Our panel opinion in this case, *see United States v. LeBrun*, 306 F.3d 545, 548-50, 552-56 (8th Cir.2002), *vacated and reh'g en banc granted* (Dec. 31, 2002), very effectively rehearsed the tactics used to bring Mr. LeBrun to the point of confessing, which included threatening to ruin him financially, preying on fears related to his cancer, and vividly limning the effects that protracted civil and criminal litigation in a faraway place would have on his family, on its reputation, and in particular on his pregnant wife. I will therefore content myself with some observations on the court's opinion and on some matters that I think have not already received proper

attention in previous opinions.

While, as the court notes, the agents never shouted at Mr. LeBrun or threatened him physically, the district court found on ample evidence that the atmosphere at the interrogation was police-dominated and that the agents frequently raised their voices and changed their tone when doing so. They also interrupted Mr. LeBrun in a bullying manner and demonstrated a threatening kind of impatience with him. The court indicates that *United States v. Astello*, 241 F.3d 965 (8th Cir.2001), *cert. denied,* 533 U.S. 962, 121 S. Ct. 2621, 150 L.Ed.2d 774 (2001), supports a conclusion that the type of pressure that Mr. LeBrun experienced could not alone render his confession involuntary, but the case is distinguishable, and it certainly establishes no bright-line legal rule about psychological pressure. In fact, the nature of the question at the heart of this case necessarily reduces the precedential value of previous cases considerably.

The court also adverts to the fact that the district court made no findings as to what promises the interrogators actually made, but instead found only that Mr. LeBrun reasonably believed that he was promised that he would not be prosecuted if he would say that he had killed Mr. Muns "spontaneously." The court then looks for support in cases that hold that a mistaken belief as to what the law is will not render a confession involuntary. But *728 in at least one of those, *Winfrey v. Wyrick*, 836 F.2d 406, 411-12 (8th Cir.1987), *cert. denied,* 488 U.S. 833, 109 S.Ct. 91, 102 L.Ed.2d 67 (1988), it was crucial to the holding that the defendant's mistaken belief that he would not be prosecuted was not induced by anything that his interviewers told him; it was based entirely on his own ideas about what the law was. I agree that that kind of mistake cannot possibly render a confession inadmissible. But the clear purport of what the

agents said in this case was that Mr. LeBrun would not be prosecuted if he said what the agents wanted him to say, and they even assured Mr. LeBrun that Mr. Muns's family approved of the deal. Indeed, they said that the family would not pursue civil remedies if he confessed and apologized. What the family wanted, the interrogators said, was simply to clear Mr. Muns's name.

In addition to the part of the interview that the court quotes in its opinion, the record reveals that, both before and after the exchange that the court isolates, the interviewers made reference to an alleged statute of limitations difficulty that would prevent prosecution for a "spontaneous" murder; and the officers intimated, moreover, that if Mr. LeBrun would simply admit to a spontaneous killing, they would call the United States Attorney in charge of the prosecution and tell him that there was no case against Mr. LeBrun. In addition, I respectfully suggest that the district court did not, as the court maintains, note that the agents qualified their representations by telling Mr. LeBrun that it was "only 'possible' " that he would not be prosecuted. In relevant part, the transcript of the interview reveals only that one of the agents said at one point that "it was possible, beyond possible" that no prosecution would take place if Mr. LeBrun would cooperate, which is significantly different from what the court asserts was said. Taken in their entirety, the agents' assurances, which operated both as representations of what the law was and as promises, were categorical.

The district court shrank from holding that an absolute promise not to prosecute was made, not because of this part of the exchange between Mr. LeBrun and his interrogators, but because the promise not to prosecute was fleetingly qualified at one point, by one agent, by the condition that Mr. LeBrun must be telling the truth that the killing was

spontaneous before the government would refrain from prosecution. This transitory allusion to truth-telling does nothing to undermine the district court's factual finding that Mr. LeBrun believed that he would not be prosecuted. My own examination of the transcript and the video tape leaves little room for doubt that the agents were in fact making such a representation about the law and a promise that Mr. LeBrun would not be prosecuted, and indeed it appears that the entire interview was deliberately structured around this stratagem. But nothing in particular really turns on this point: The coercive effect, if any, of a reasonably perceived promise is exactly the same as that of an actual promise.

In addition to the coercive tactics that the court briefly rehearses, among the enlarged pictures displayed prominently on the wall of the small interrogation room was a picture of Mr. Muns's family at his gravesite. The agents, moreover, did not merely invent generic phantom witnesses to the killing; they contrived a bizarre tale of a suicide note implicating Mr. LeBrun, and even claimed that there were other witnesses to the killing who were so haunted that their lives had been ruined by what they had seen. These were all knowing falsehoods. None of this finds a place in the court's opinion. Finally, and perhaps most importantly, the court fails altogether to mention the district court's finding that, *729 despite the agents' assurances, Mr. LeBrun did not feel free to leave as the interview progressed. This is a finding of fact that is supported by Mr. LeBrun's testimony and cannot be reasonably rejected as clearly erroneous. It is also a finding that weighs heavily in favor of the district court's conclusion that Mr. LeBrun's confession was involuntary.

This is probably the right juncture to observe that it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more "coercive" than

statements that are true. Such techniques may be reprehensible, but that fact would not seem to contribute to their propensity to overwhelm the will. Perhaps it is enough simply to note that the Supreme Court has said that "[t]he fact that the police misrepresented the statements that [a witness] had made is ... relevant," *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), in circumstances like the present ones. But we need also to consider the possibility that what lies at the bottom of these kinds of cases is not merely an aversion to something called coercion, but a general uneasiness about the fairness of admitting confessions that were induced by knowing, lurid falsehoods and unfulfilled promises, whether "coercive" or not. In fact, the Supreme Court has specifically said that "the admissibility of a confession turns as much on whether the techniques for extracting the statements ... are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."*Miller v. Fenton*, 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

In sum, a consideration of the evidence in this case, including the kinds of pressure that were brought to bear on Mr. LeBrun, the assurances of leniency that went unfulfilled, and the deceit that the interrogators practiced, leads me to the conclusion that his confession was illegally obtained and should have been suppressed. At the very least, it seems to me relatively plain that the government has not carried its burden, *see Lego v. Twomey,* 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), of showing that the relevant statements were voluntary.

I therefore respectfully dissent and would affirm the judgment of the district court. Affirming the judgment, not

incidentally, has the effect of specifically performing the promise that an objective observer would conclude Mr. LeBrun's interrogators made to him, an altogether appropriate and equitable result.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-4005

United State of America,	*	
	*	
Appellant,	*	Appeal from the
v.	*	United States District
	*	Court for the Western
Michael Edward LeBrun,	*	District of Missouri
	*	
Appellee.	*	

Submitted: May 14, 2002

Filed: October 3, 2002

Rehearing En Banc Granted, Opinion Vacated Dec. 31, 2002

Before HANSEN, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and PRATT,[1] District Judge.

PRATT, District Judge.

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[1] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

The United States of America appeals from the district court's[2] ruling suppressing all out-of-court statements made by Michael Edward LeBrun on September 21, 2000. We affirm the district court's ruling.

I.

In January 1968, Michael Edward LeBrun and United States Naval Ensign Andrew Muns were shipmates aboard the U.S.S. Cacapon, a Navy fueling vessel. Both men were assigned to work in the ship's disbursement office, an area where cash was kept in a safe for purposes of paying the ship's personnel. Sometime in the late evening hours of January 16, or in the early morning hours of January 17, 1968, while the ship was moored in Subic Bay, Philippines, Ensign Muns disappeared. Shortly after Muns' disappearance, approximately $8600 was found to be missing from the disbursement office. Naval investigators conducted an investigation and concluded that Muns had stolen *548 the money from the disbursement office and deserted the Navy.

Having never believed the conclusion of the Navy, Muns' sister convinced Special Agent Peter Hughes of the Naval Criminal Investigative Service, Cold Case Homicide Unit (NCIS), to reopen the investigation in August 1998. On four separate days in November 1999, NCIS agents interviewed LeBrun concerning his involvement in Muns' disappearance. On the first occasion, November 17, 1999, Special Agent Hughes told LeBrun that he was conducting security clearance background investigations on people that LeBrun worked

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[2] The Honorable H. Dean Whipple, United States District Judge for the Western District of Missouri.

with in the military. He asked LeBrun to meet him at the Gardner, Kansas Police Department. Once there, Hughes informed LeBrun that the true purpose of the meeting was to discuss the disappearance of Muns. During the nearly five hour interview, LeBrun provided vague answers and agreed to submit to a polygraph examination. Two days later, on November 19, 1999, LeBrun drove himself to the Kansas Bureau of Investigation to take a polygraph examination. Upon his arrival, LeBrun was informed of his Miranda rights pursuant to *Miranda v. Arizona*, 384 US. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). No polygraph examination was taken that day, but a four hour interview was conducted. LeBrun returned to the Kansas Bureau of Investigation on November 20, 1999, was again given his Miranda rights, and again consented to speak to investigators. On this occasion, he stated that he may have repressed memories regarding Muns' disappearance and asked Hughes if he knew of a therapist who could help him reveal the memories. Again, no polygraph examination was administered. On November 21, 1999, LeBrun met with investigators at the Olathe, Kansas Police Department. LeBrun was advised of his Miranda rights, executed a Civilian Suspect Acknowledgment and Waiver of Rights Form, and proceeded to participate in an interview with investigators. At the end of the interview, LeBrun indicated that he wanted to attempt to recover his repressed memories and suggested another interview in approximately three weeks. On December 16, 1999, Special Agent Hughes called LeBrun to inquire as to his progress. LeBrun relayed that he had not recovered any repressed memories since the last interview. Hughes had no further contact with LeBrun until after his confession on September 21, 2000.

In September 2000, Hughes and two other NCIS agents, Special Agents Early and Grebas, decided to talk to LeBrun

again. The agents believed that LeBrun was the primary suspect in Muns' disappearance. Agent Hughes indicated that a significant amount of planning took place prior to the interview in an effort to make it as formal a process as possible. Agents planned in advance how LeBrun would be transported to the interview, who would conduct the interview, and whether or not the Miranda warnings would be read to him.[3] They also arranged to have enlarged photos of LeBrun's family and house, the U.S.S. Cacapon and LeBrun's shipmates, and other scenes from LeBrun's life on the walls in the interview room.

On September 21, 2000, Special Agent Early and Corporal Hunter of the Missouri Highway Patrol drove to LeBrun's office, without prior notice, in plain clothes. Corporal Hunter identified himself to LeBrun, told him they were conducting an *549 investigation, and asked LeBrun to accompany them. LeBrun asked what the investigation was about. Corporal Hunter told him that they could not tell him what it was about, but that it had nothing to do with his family. LeBrun, believing that it had to do with certain potentially illegal activities of his employer, agreed to accompany the officers.

Once outside, LeBrun was told by the officers that they would give him a ride. LeBrun offered to drive himself, but the officers told him they would prefer he ride with them. LeBrun rode to the Highway Patrol Station in the front passenger seat of an unmarked highway patrol car. Both

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[3] The agents testified at the suppression hearing that they did not believe Miranda warnings would be required as they did not have probable cause to arrest LeBrun and because they did not believe the interrogation would be custodial in nature.

Agent Early and Corporal Hunter carried firearms, however, LeBrun was only aware that Corporal Hunter was armed.

Once at the Highway Patrol Station, LeBrun was told that he was not under arrest, and that he was free to terminate the interview and leave the building at any time. Agent Early, who had not yet identified himself as an NCIS investigator, advised LeBrun that he was subject to audio and video recording anywhere in the building. Agent Early then led LeBrun to the interview room. The walls of the windowless room were covered with the enlarged photos from LeBrun's life. LeBrun was seated in a straight chair with his back to the wall. Once seated, Agent Early identified himself as an NCIS investigator. Agent Grebas entered a short time later and began the interview. Agents Early and Grebas sat in chairs with armrests and rollers a few feet in front of LeBrun. No furniture was positioned between the agents and LeBrun. The agents were not armed while in the interrogation room.

Agents Early and Grebas admittedly lied to LeBrun about the level of evidence they had implicating him in Muns' disappearance. Early during questioning, Agent Early told LeBrun, "There is absolutely no doubt that you were responsible for Ensign Muns death. Absolutely no doubt about it. I know you know that. I know you believe it. I believe it."[4] The agents also intimated that they had two eyewitnesses to Muns' death and a suicide note written by a third individual that implicated LeBrun in Muns' death. Agent Early indicated that the only issue he and Agent Grebas were interested in was whether Ensign Muns' death was premeditated or spontaneous. Agent Early also told LeBrun,

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[4] Interrogation Tr. at 4.

"[W]e have information and we have evidence that is going to result in grand jury proceedings."[5] The agents told LeBrun that they were ready to proceed with a premeditated murder charge against him, that he would be extradited to Alaska, his reputation would be destroyed, his family's reputation would be destroyed, and he would be financially ruined. The Agents also told LeBrun that Muns' family would file a civil suit against him and asked LeBrun, "How do you think [Jon Benet Ramsey's] family is living today."[6] The agents advised LeBrun that Ensign Muns' family was present at the Highway Patrol Station and were prepared to forgive him if he admitted to a spontaneous killing.[7]

After approximately thirty-three minutes, LeBrun confessed to the murder of Ensign Muns. He stated that Muns walked into the disbursement office while he was stealing money from the ship's safe. According to LeBrun, he panicked *550 and killed Muns. LeBrun then went on to describe how he disposed of the victim's body and eventually reenacted the murder with Agent Early in the role of the victim. After the reenactment, LeBrun asked to use the bathroom and requested a cigarette break. Special Agent Early accompanied LeBrun to the restroom and then escorted him outside for a cigarette.[8] After reentering the station,

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[5] *Id.* at 5.

[6] *Id.* at 13.

[7] Ensign Muns' sister and a law enforcement agent masquerading as Muns' brother were, in fact, in another room at the station.

[8] Agent Early testified that he accompanied LeBrun to the restroom because he also needed to use the facilities. He further

LeBrun was asked if he wanted to apologize to Muns' sister. She entered the interview room, along with Special Agent Billington of NCIS who represented to LeBrun that he was Muns' brother. Agents Early and Grebas knew that LeBrun was recovering from cancer and told him that the agent posing as Muns' brother had advanced cancer and had only a short time to live. Agent Billington told LeBrun that he wanted to find out everything about his "brother's" death. LeBrun became emotional and apologized to Muns' sister for his death. He asked if he could maintain contact with the family as he uncovered more memories about the death, but was advised that he should communicate through NCIS agents. In total, the interview lasted approximately two hours. At its conclusion, LeBrun consented to a search of his home. Agents Early and Grebas drove LeBrun home and conducted the search. LeBrun was not arrested that day, but was later arrested and indicted for felony murder.

LeBrun moved to suppress inculpatory statements made during the interview. LeBrun claimed that he was subjected to a custodial interrogation without the benefit of Miranda warnings and that his confession was involuntary. The

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testified that, although he didn't smoke, he escorted LeBrun outside to ensure he would be able to get back into the building and to ensure he wouldn't hurt himself or others. LeBrun testified that he believed Agent Early was "escorting" him. The district court, in its findings of fact, determined that LeBrun's account and testimony at the suppression hearing were more credible. "Because the district court is in a better position to assess the credibility of the witnesses, its determinations regarding credibility are 'virtually unreviewable on appeal.' " *United States v. Black*, 88 F.3d 678, 680 (8th Cir.1996) (quoting *United States v. Heath*, 58 F.3d 1271, 1275 (8th Cir.1995)). We find no clear error in the district court's decision to credit LeBrun's testimony on these questions.

Government argued that LeBrun's confession was voluntary and that he was not in custody, thus no Miranda warning was required. The district court concluded that all but two of the factors outlined in *United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990), weighed in favor of a finding that LeBrun was in custody and that LeBrun's confession was inadmissible based on the failure to advise LeBrun of his Miranda rights. The district court also found LeBrun's confession to be involuntary based on the totality of the circumstances.

II.

The review of a district court's "in custody" determination for *Miranda* purposes involves a "mixed question of law and fact requiring '[t]wo discrete inquiries.' " *Evans v. Rogerson,* 233 F.3d 869, 872 (8th Cir. 2000) (citing *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 459, 133 L.Ed 2d 383 (1995)). We will uphold findings of historical fact unless they are clearly erroneous, but we review the application of the controlling legal standard to the facts de novo. *United States v. Axsom,* 289 F.3d 496, 500 (8th Cir. 2002).

III.

There is no dispute that LeBrun was not formally placed under arrest either *551 before, or immediately after his interrogation by Agents Early and Grebas. However, formal arrest is not the only circumstance where Miranda warnings must be given. *Miranda* requires that any time a person is subject to custodial interrogation, a law enforcement officer must, prior to commencing questioning, advise the person of his right to be free from compulsory self-incrimination and of his right to have the assistance of counsel. *Miranda,* 384 U.S. at 444, 86 S.Ct. at 1612. A determination of whether an

individual is in custody requires a careful evaluation of the totality of the circumstances. *United States v. Hanson,* 237 F.3d 961, 963 (8th Cir. 2001). To determine whether LeBrun was entitled to have the Miranda warning read to him, we must decide whether the questioning of LeBrun by Agents Early and Grebas was custodial in nature.

The mere fact that an investigation has focused on a particular suspect does not trigger the need for Miranda warnings in noncustodial settings. *Minnesota v. Murphy,* 465 U.S. 420, 431, 104 S.Ct. 1136, 1144, 79 L.Ed.2d 409 (1984). Rather, a suspect is deemed "in custody" and entitled to Miranda warnings only when he has been formally arrested or when he is "deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444, 86 S.Ct. at 1612; *Berkemer v. McCarty,* 468 U.S. 420, 429, 104 S. Ct. 3138, 3144-45, 82 L.Ed.2d 317 (1984). To make this determination, we must examine the physical and psychological restraints placed on the suspect during the interrogation in light of whether a reasonable person in the suspect's position would have understood the situation to be custodial. *Griffin,* 922 F.2d at 1349 (citing *Berkemer*, 468 U.S. at 442, 104 S.Ct. at 3151). We must also examine "the place, purpose and length of the interrogation, the suspect's freedom to leave the scene, and other indicia of custody." *Griffin*, 922 F.2d at 1349. "The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California,* 511 U.S. 318, 323, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994).

While not an exhaustive list, we have identified relevant mitigating and aggravating factors to be considered in determining whether, under the totality of the circumstances,

a suspect is in custody. *Griffin,* 922 F.2d at 1349. These factors are:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning. *Id.*

The first three *Griffin* factors, if answered affirmatively, weigh against a finding of custody, while the last three factors weigh in favor of custody.

There is no dispute that Agents Grebas and Early informed LeBrun, prior to the commencement of questioning, that he was not under arrest. Additionally, Agents Early and Grebas both testified that LeBrun was free to leave the interrogation at any time. The appellant contends that ***552** *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), controls the issue. In *Mathiason,* a police officer investigating a theft left his card at the suspect's apartment with a note asking him to call. *Id.* at 493, 97 S.Ct. at 713. The suspect called the officer and the officer and the suspect met at the state patrol office, approximately two blocks from the suspect's home, a short time later. *Id.* The officer met the

suspect in the hallway, took the suspect to a room, and advised him that he was not under arrest. *Id.* Only five minutes after arriving at the office, the suspect admitted to the theft. *Id.* The Supreme Court found the situation non-custodial, relying on the suspect's voluntary presence at the police station, the short duration of the interview, and the fact that his freedom to depart was not in any way restricted. *Id.* at 495, 97 S. Ct. at 714.

We find the facts of this case readily distinguishable from *Mathiason.* In this case, officers whom LeBrun had never met before arrived at his place of employment and requested that LeBrun accompany them in regards to a matter which the officers would not identify. While LeBrun was generally acquiescent in the suggestion of officers to ride with them, it is clear that the officers made affirmative efforts to prevent LeBrun from driving his own vehicle from his office in Oak Grove, Missouri to the Highway Patrol Station in Lee's Summit, Missouri. The two towns are at least thirteen miles apart and no public transportation is available between them. Because LeBrun rode to the station with the officers, on the suggestion of the officers, he was dependent on those same authorities for a ride home. While there was no affirmative lie told to LeBrun regarding the purpose of the interview, as in *Hanson,* 237 F.3d at 964 (officers told suspect they wanted him to view photos of recent vandalism at an abortion clinic, but actually sought to question the suspect about an arson attempt), the authorities clearly employed a planned strategy to prevent LeBrun from realizing the true nature of the interview until he was at the Highway Patrol Station.[9]

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[9] Prior to September 21, 2000, LeBrun had only dealt with Special Agent Hughes of the NCIS. In his previous contacts with law enforcement, Agent Hughes always contacted LeBrun ahead of time to

LeBrun did not know, at the time of his consent to accompany the officers, that they were going to question him about Muns' disappearance and "therefore did not 'voluntarily acquiesce' to the subsequent interrogation." *Id.*

The district court described the interview room as a "rectangular, windowless room the dimensions of which are difficult to discern." This finding is not clearly erroneous based on our review of the video recording of the September 21, 2000, interview. The walls of the room were covered in enlarged photos of scenes from the U.S.S. Cacapon and from LeBrun's life. No furniture separated LeBrun, who was seated with his back to the wall in a straight chair, from Agents Grebas and Early, who were seated approximately three feet from LeBrun on either side of him. LeBrun was advised that he was subject to audio and video recording, and indeed, the interview and LeBrun's subsequent confession were videotaped by a camera stationed behind an observance mirror in the room. Almost immediately, the agents began telling LeBrun that they were positive he had killed Ensign Muns. They told him they had evidence that would result in grand jury proceedings. Agent Early told LeBrun, "I know you are responsible for Ensign Muns ... I know *553 that. We can show that."[10] Agent Grebas intimated that Agent Early was the one who believed an interview should take place, whereas he thought, "I should be going to your work and putting [sic] you in cuffs and taking you out."[11] The agents told LeBrun that the day of the interview was the only

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arrange a time and place for an interview.

[10] Interrogation Tr. at 6.

[11] *Id.* at 11.

day that he would have control over whether he kept his house, his pregnant wife, his stepdaughter, and his job. They stated, "If you choose to play hardball, then ... we are going to criminal court."[12] Then, referencing a potential media frenzy and the Jon- Benet Ramsey case, the agents told LeBrun that Ensign Muns' family was very wealthy and was prepared to take him to civil court over the matter.

In *Stansbury,* the Supreme Court held that "an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the Miranda custody inquiry." *Stansbury,* 511 U.S. at 323, 114 S.Ct. at 1529. Nonetheless, "[a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned .... Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.' " *Id.* at 325, 114 S.Ct. at 1529. Similarly, the tactic of lying to a suspect about the evidence police have does not make a confession per se invalid, but can be considered in evaluating the totality of the circumstances. *See Frazier v. Cupp,* 394 U.S. 731, 737-39, 89 S.Ct. 1420, 1424, 22 L.Ed.2d 684 (1969). We believe that a reasonable individual, placed into the police-dominated environment of the interview room in this case, and confronted with threats of criminal charges, civil lawsuits, and the loss of those aspects of his life most important to him, would feel a substantial diminishment in his freedom of action. Similarly, a reasonable person, told by authorities that they possess "incontrovertible" evidence of criminal guilt,

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[12] *Id.* at 13.

would unlikely feel free to leave the interrogation. As stated in *Hanson,* "[t]he agents wanted a confession ... and it appears that they deliberately waited until they had the suspect in an intimidating environment before they advised him of their true purpose for bringing him to the station." *Hanson,* 237 F.3d at 965.

"Any interview of one suspected of a crime by a police officer will have coercive aspects to it simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Mathiason,* 429 U.S. at 495, 97 S.Ct. at 714. Nonetheless, we have found that "[a] strong presumption of impropriety attaches to any circumstances where this Court detects the use of coercive interrogation techniques to obtain confessions." *Griffin,* 922 F.2d at 1351 (citing *United States v. Carter,* 884 F.2d 368, 371 (8th Cir. 1989)). The district court found that Agents Early and Grebas employed at least two such coercive techniques: the "friendly-unfriendly" or "Mutt and Jeff" routine and the "cast blame on the victim" tactic, both coercive police strategies discussed in *Miranda,* 384 U.S. at 452, 86 S.Ct. at 1616. Despite the appellant's objection, we cannot say that the district court committed clear error in finding that these techniques were used. Indeed, evidence of the "Mutt and Jeff" routine is evident in the videotape of the interrogation. *554 Agent Early generally maintained a conversational, friendly tone of voice while Agent Grebas would often assume an unfriendly, antagonistic demeanor. Agent Early repeatedly assured LeBrun that he only wanted to "get to the truth about what happened."[13] Agent Grebas, on the other hand, repeatedly

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[13] Interrogation Tr. at 7.

told LeBrun that he was against the interview and believed that LeBrun should be arrested for premeditated murder. While not used heavily, a finding that the "blame the victim" tactic was used is also supported by the videotape of the interrogation.[14] In addition to these tactics, the record is full of instances where the agents attempted to "bond" with LeBrun,[15] to appeal to his loyalty to his family and to threaten his social and financial demise if he didn't cooperate. We believe these factors weigh heavily in favor of a finding of custody.

Also relevant to our inquiry is the length and tenor of the interrogation. While *Miranda* was concerned primarily with lengthy "marathon" interrogations, custody may be found in relatively brief interrogations where the questioning is of a sort where "the detainee is aware that questioning will continue until he provides his interrogators the answers they seek." *Griffin*, 922 F.2d at 1348 (citing *Berkemer*, 468 U.S. at 439, 104 S.Ct. at 3149). In this case, Agents Early and Grebas told LeBrun on five separate occasions that he could go home *at the conclusion* of the interview. At one point, Agent Early said, "You know what? When you say, 'You know what Special Agent Early, I killed him.' You know what. We can stop. Because you know why, you can say

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[14] Agent Grebas stated, "It's under the little thing of why, that is why is it premeditated. Think two weeks out of the box. You know, I didn't like Andy Muns and you didn't like Andy Muns. Why? Because you were that person on the ship. You ran that disbursing office. You had done your time and then in comes this boot officer. You know what, he was a snotty-nosed kid who probably didn't deserve to wear an officer's uniform." Interrogation Tr. at 16.

[15] For example, Agent Grebas described to LeBrun how he had a killed a man in the line of duty. *See* Interrogation Tr. at 19-20.

this, it wasn't premeditated. It was spontaneous. That's all you need to say and we are done."[16] We believe that a reasonable person in LeBrun's position would believe that questioning was going to continue until the NCIS agents obtained the information they sought.

The appellant reminds us repeatedly that, without LeBrun's confession, there is insufficient evidence to proceed with prosecution in this case. While this may appear to be an unjust result, we are reminded of the words of former Chief Judge Richard S. Arnold in *Williams v. Nix,* 700 F.2d 1164 (8th Cir.1983), *rev'd,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984):

> A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

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[16] Interrogation Tr. at 16.

Id. at 1173. Weighing against a finding of custody in this case are simply the facts *555 that LeBrun was advised he was free to leave and was not arrested at the conclusion of the interrogation. However, we believe that the record reflects restrained freedom of movement,[17] less than voluntary acquiescence to questioning, the employment of deceptive stratagems by law enforcement, and a police-dominated atmosphere. Based on the totality of the circumstances, we believe that a reasonable person in LeBrun's position would have felt a substantial restraint on his freedom to leave the interrogation. Thus, LeBrun was in custody at the time of his initial confession and should have been provided with Miranda warnings.

IV.

Even were we to find that LeBrun was not in custody for purposes of *Miranda,* we would still affirm the decision of the district court because LeBrun's confession was involuntary. The voluntariness of a confession is a legal inquiry subject to plenary review by the appellate courts. *Miller v. Fenton,* 474 U.S. 104, 114, 106 S.Ct. 445, 452, 88 L.Ed.2d 405 (1985). In determining whether a confession was voluntary we must examine the entire record for evidence that the statement was given under such circumstances which would indicate that the defendant was coerced or his will overborne. *Davis v. North Carolina,* 384 U.S. 737, 742, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 (1966); *see also Rachlin v. United States,* 723 F.2d 1373, 1377 (8th Cir. 1983). In this analysis the court employs a

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[17] While Agent Early's "escort" of LeBrun to the restroom and outside took place after LeBrun's initial confession, they are still demonstrative of the overall tone of the interrogation. While not necessary to our finding that LeBrun's freedom was restricted, this evidence lends additional support to our finding that LeBrun was in custody.

flexible totality of the circumstances approach, considering the specific interrogation tactics employed, the details of the interrogation, and the characteristics of the accused. *Rachlin*, 723 F.2d at 1377. Custodial statements are presumed involuntary and the government must overcome the presumption by a preponderance of the evidence. *Tippitt v. Lockhart,* 859 F.2d 595, 597 (8th Cir. 1988), *cert. denied,* 490 U.S. 1100, 109 S.Ct. 2452, 104 L.Ed. 2d 1007 (1989).

LeBrun, at the time of the September 21, 2000, interview, was in his mid-fifties and had recently recovered from cancer. He had completed college and attended one year of law school. He was employed as a project manager for a real-estate sales company. He was married with a stepdaughter and another child on the way. He had been interviewed by law enforcement regarding Muns' disappearance several times less than a year prior to his confession. On three of those occasions, LeBrun was advised of his Miranda rights. LeBrun had no other contact with law enforcement prior to 1999.

"Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne." *Jenner v. Smith,* 982 F.2d 329, 334 (8th Cir. 1993). Indeed, " '[T]here is nothing inherently wrong with efforts to create a favorable climate for confession.' " *Id.* (citing *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir. 1988), *cert. denied,* 488 U.S. 900, 109 S.Ct. 247, 102 L.Ed. 2d 236 (1988)). In this case, Agents Early and Grebas lied about the evidence against LeBrun. They told him they possessed "incontrovertible" evidence, including eyewitness testimony, that he had killed Ensign

Muns. They told him that if he resisted confessing, he *556 would be subject to charges in Anchorage, Alaska. The agents played on LeBrun's specific concerns over his health and his pregnant wife by telling him that a criminal trial would ruin his family's good name and his family's financial resources would be drained from the expense of defending himself in Alaska. Additionally, the agents repeatedly told LeBrun that if he confessed to a "spontaneous" act, he could not be prosecuted because the statute of limitations had expired. Finally, the agents told LeBrun that Muns' sister was waiting in the next room and that she was willing to forgive him if he admitted to spontaneously killing Muns.

We believe that separately, lies and strategies such as these would not be sufficiently coercive to cause an individual in the position of LeBrun to have his will overborne. However, when viewed as a whole, it appears that the entire atmosphere of the interrogation was police-dominated, highly coercive, and designed to elicit a confession in any way possible. We are particularly troubled by the repeated statements to LeBrun to the effect that he could only be prosecuted for a premeditated murder. Agents continually intimated to LeBrun that they had a great deal of control over what charges would be brought against him. Agents Early and Grebas told LeBrun that if he confessed to spontaneously killing Muns, he would not be prosecuted. Appellant urges us to find that LeBrun simply misunderstood the legal consequences of his confession, through no fault of the interrogating officers, and that his confession should be held voluntary. *See Winfrey v. Wyrick,* 836 F.2d 406 (8th Cir. 1987) (defendant's murder confession voluntary even though he mistakenly believed that an element of the charge would be negated if the crime was accidental); *United States v. Larry,* 126 F.3d 1077 (8th Cir. 1997) (promise not to prosecute for

drive-by shooting did not render confession to being a felon-in possession of a firearm involuntary).

Viewing the interrogation as a whole, however, it appears clear that a reasonable person in LeBrun's position would have perceived the statements of the agents as a promise of nonprosecution if LeBrun confessed to a spontaneous act. This is distinguishable from cases such as *Larry,* where a defendant is promised that he will not be charged for the crime under investigation, but admits to facts comprising a distinct and separate crime. After LeBrun told Agents Early and Grebas that he believed there was no statute of limitations on homicide, Agent Early responded, "It depends on how the act was completed ... premeditation or not." It is clear from reading the transcript and viewing the videotape of the interrogation that Agents Grebas and Early were attempting to get LeBrun to admit that Muns caught him stealing money from the disbursement office safe and that LeBrun killed Muns to avoid getting caught. Admission of those facts constitutes felony murder. Yet, Agents Early and Grebas clearly led LeBrun to believe that there were only two possible types of murder for which he could be charged-premeditated or spontaneous. The following colloquy is demonstrative:

> **GREBAS:** And if you will be man enough and stand up to the plate and say, You know what guys, it was "spontaneous." We are on the phone saying we got a problem with the statute of limitation. It's possible, beyond possible; you won't be prosecuted at all. And I

want to throw-up when I say that, but I will-that's my word to you.

LEBRUN: Right

GREBAS: Special Agent Early?

EARLY: Absolutely.

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LEBRUN: What's the statute of limitation?

GREBAS: There is no second-degree murder.

EARLY: It's five years from the time of the incident. It's called "manslaughter" in the federal system.

LEBRUN: Okay.

EARLY: Tell the truth.

GREBAS: Now, it was spontaneous; is that right, Michael? It was, the choice was, either I was going to brig, either I was going to the brig, or Andy Muns had to die and that was a selfish act. That's the first step in this. I am ready to go to the phone.

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.[18]

Appellant contends that Agents Early and Grebas used the term "spontaneous" interchangeably with the specific legal term, manslaughter. However, the only mention of "manslaughter" in the transcript of the interrogation occurs on page twenty-one, whereas the agents discuss spontaneous versus premeditation more than a dozen times before the singular mention of manslaughter. Viewing the entire tenor of the interrogation, the attempt to qualify the term spontaneous seems like nothing more than a desperate attempt to make the record appear as the agents meant it to appear, rather than how it actually did. Such trickery, coupled with

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[18] Interrogation Tr. at 20-21.

the coercive tactics outlined above, lead us to believe that LeBrun's confession was involuntary in light of the totality of the circumstances.

V.

The Government concedes that a finding that LeBrun's initial confession to Agents Early and Grebas was illegal would necessitate a finding that LeBrun's second confession to Muns' sister was "fruit of the poisonous tree," pursuant to *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). Because we find that LeBrun was in custody at the time of his initial confession, and because that confession was involuntary, we also find that LeBrun's statement to Muns' sister was illegally obtained. We, therefore, affirm the judgment of the district court.

HANSEN, Circuit Judge, dissenting.

I do not agree that LeBrun was "in custody" within the meaning of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), at the time he confessed to killing a superior officer and to disposing of the body in a tank of caustic fuel oil. Nor do I agree that LeBrun was "in custody" at the time he voluntarily reenacted the homicide, demonstrating how he strangled Ensign Muns while smashing his head against the deck of the disbursing office. Nor do I agree that LeBrun was "in custody" at the time he apologized to Muns' sister for killing her brother. Finally, I do not agree that LeBrun's confessions to and reenactment of Muns' killing were the product of compulsion. Accordingly, I respectfully dissent.

*558 I find the court's attempt to distinguish this case from *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), unpersuasive, and I conclude that *Mathiason* is on all-fours with this case. The court first notes that the officers transported LeBrun thirteen miles to the Highway Patrol Station and that LeBrun was therefore dependent on the authorities for transportation, whereas Mathiason walked only a short distance to the state patrol office thereby rendering him independent of the authorities. *Id.* at 495, 97 S.Ct. 711. In my view, the distinction is unavailing. The court ignores the fact that LeBrun carried his cellular phone in his pocket during the entire interview. He was free to make and receive calls during the entire interview. The videotape of the interview shows that LeBrun telephoned his wife from the Highway Patrol Station during the course of the interview. Thus, unlike the defendant in *United States v. Hanson,* 237 F.3d 961, 965 (8th Cir. 2001) (finding "custody" because, among other things, the defendant was dependent on authorities for transportation back to his residence), LeBrun was not dependent upon the authorities for transportation. LeBrun could have easily arranged for alternative transportation by calling a coworker, a friend, a relative, his spouse, or even a taxicab.

The court also recites facts from which it concludes that this interview was conducted in a police-dominated environment and in a coercive manner. Specifically, the court notes the small dimensions of the interview room, the agents' admittedly coercive interview tactics, and the agents' misrepresentation of the evidence they had collected against LeBrun. As the majority correctly notes, however, "a noncustodial situation is not converted to one in which *Miranda* applies simply because ... the questioning took place in a 'coercive environment.' " *Mathiason,* 429 U.S. at 495, 97

S.Ct. 711. Indeed, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Id.* The fact that the atmosphere was police-dominated is unsurprising, as the interview took place in a highway patrol station. Also, the fact that the agents exaggerated the amount of evidence that had been collected against LeBrun bears little on the custody issue. *Id.* at 495-96, 97 S.Ct. 711 (stating that fact that officer lied about finding defendant's fingerprints at the scene of the crime had "nothing to do with whether respondent was in custody for purposes of the *Miranda* rule"). Thus, the facts upon which the court relies do not distinguish this case from *Mathiason;* rather, the *Mathiason* Court considered analogous facts and concluded that they did not convert a noncustodial interview into a custodial interrogation. *Cf. Mathiason,* 429 U.S. at 494, 97 S.Ct. 711 (recognizing that the interview took place behind closed doors, that the officer told the defendant that he was a suspect, and that the officer falsely told the defendant that the police had evidence against him).

In addition, the court overstates the coercive aspects of this interview in an attempt to distinguish *Mathiason.* LeBrun was never physically restrained. He was never placed in handcuffs. Unlike the defendant in *Hanson*, LeBrun was transported to the Highway Patrol Station in the front seat of an unlocked patrol vehicle. As aforementioned, LeBrun had his cellular phone with him during the interview, and he called his wife from the interview room. While the mere possession of a cellular phone without more will not transform a custodial interrogation into a noncustodial one, it is relevant to the question *559 of whether the interview was coercive and whether a reasonable person in the same

circumstances would feel restrained. *See United States v. Unser*, 165 F.3d 755, 766 (10th Cir.) (noting that use of a cellular phone during an interview is a factor supporting a finding of no custody), *cert. denied,* 528 U.S. 809, 120 S.Ct. 40, 145 L.Ed.2d 36 (1999). The cellular phone provided LeBrun a line of communication between himself and the outside world. The possession of a cellular phone mitigates the incommunicado nature of interrogations with which the *Miranda* Court was concerned and dulls the psychological pressure associated with being isolated in an interview room.

In its custody analysis, the court simply fails to consider that LeBrun's age and experience militate against a finding of "custody." In our objective "custody" analysis, the relevant inquiry is not whether any random reasonable person would have determined that he was "in custody," but whether a reasonable person in the *defendant's position* would have considered his freedom of action restricted to the degree associated with a formal arrest. *Feltrop v. Bowersox,* 91 F.3d 1178, 1181 (8th Cir. 1996), *cert. denied,* 520 U.S. 1242, 117 S.Ct. 1849, 137 L.Ed.2d 1051 (1997). LeBrun's age, work experience, education, specifically his legal training, and his past experience with NCIS agents militate against a finding of custody. *See United States v. Rorex,* 737 F.2d 753, 756 (8th Cir. 1984) (stating that the age and experience of the interviewee is a relevant factor in the custody determination). LeBrun is in his mid-fifties. He is a military veteran and is gainfully employed as a manager in a real estate office. He has a college education and has completed one year of law school. In short, LeBrun is an educated, somewhat sophisticated individual. More importantly, LeBrun had past experience and dealings with NCIS investigators. NCIS agents interviewed LeBrun on four different occasions. Significantly, in none of the prior interviews was LeBrun placed under arrest. Thus, on this occasion, after learning

that the interviewers were NCIS agents, LeBrun could draw upon his experiences with other NCIS agents to conclude that he likely would not be arrested here. LeBrun would have no reason to disbelieve the agents when they explicitly informed him before entering the Highway Patrol Station that he was not under arrest and that he was free to leave at any time. LeBrun also would have no reason to disbelieve the agents when they told him on three separate occasions during the interview that he was free to leave and that he could go home. In fact, the district court explicitly found that at the start of the interview LeBrun believed he could terminate the interview and leave if he wanted to. (R. at 62.) The fact that Agents Early and Grebas did not arrest LeBrun after the interview supports the conclusion that LeBrun was not "in custody." *See United States v. Sutera,* 933 F.2d 641, 647 (8th Cir. 1991) (stating that it was a "very important fact that the officers did not contemplate arresting the defendant).

Viewing the totality of the circumstances, I conclude that a reasonable, college educated, and legally trained person who has had prior experience with the practice and procedure of a particular law enforcement organization, who willingly agreed to be interviewed, who was specifically told on four different occasions during the course of the interview that he was not under arrest or could go home, and who could easily facilitate transportation from the interview site via cellular phone would not have perceived that his freedom of action was restrained to the degree associated with formal arrest. I conclude that this case is controlled by *Mathiason* in all relevant respects and, accordingly, *560 would reverse the judgment of the district court.

Likewise, I do not agree with the conclusion that LeBrun's incriminating statements were compelled. The appropriate test for determining whether a confession was involuntarily

made is whether the totality of the circumstances surrounding the confession indicates that "the defendant's will was overborne and his capacity for self-determination critically impaired." *United States v. Astello,* 241 F.3d 965, 967 (8th Cir.), *cert. denied,* 533 U.S. 962, 121 S.Ct. 2621, 150 L.Ed.2d 774 (2001). This requires that we look at "both the conduct of agents and [the defendant's] capacity to resist pressure to confess." *Id.*

Neither Agent Grebas nor Agent Early was armed during the interview. (R. at 62.) The district court found that the agents never shouted at LeBrun (R. at 61) or physically threatened him (R. at 68). Review of the interview videotape demonstrates that this finding is not clearly erroneous. The government concedes, however, that it used psychological coercion to facilitate a confession. While some of the psychological pressure employed in this case was creative, much of it was standard interview technique, and the government's use of such tactics does not render a confession involuntary per se. For example, we have previously held that tactics such as subjecting a suspect to psychological pressure, making false promises, playing on a suspect's emotions, and using his family against him did not render a confession involuntary *Astello*, 241 F.3d at 967-68. The court correctly recognizes that the type of psychological pressure Agents Grebas and Early exerted on LeBrun here did not alone render his confession involuntary. The court concludes, however, that these tactics, when coupled with the agents' statements concerning nonprosecution, rendered his confession involuntary. I most respectfully disagree.

It is unclear if any promise was even made here. The transcript demonstrates that Agent Grebas qualified his statements, stating that it was only "possible" that LeBrun would not be prosecuted. (Tr. at 20-21.) In addition, it is

unclear what the promise-if any-was. It is unclear whether the agents told LeBrun that he could not be prosecuted for murder or whether the agents simply told LeBrun that he could not be prosecuted for "spontaneous murder." Finally, the district court explicitly rejected the magistrate judge's findings regarding the alleged promises not to prosecute. The district court found only that "LeBrun *believed* he would not be prosecuted if he confessed to a 'spontaneous' murder." (R. at 83-84.) The district court did "not make any findings as to what-if any-promise was actually made, or what the legal effect of any promise [was]." (Id.) Thus, our court relies upon facts the district court specifically declined to find. Applying the facts as actually found by the district court, I conclude that LeBrun's confession was not compelled because a defendant's mistaken *belief* that he could not be prosecuted does not render a confession involuntary. *See United States v. Kilgore,* 58 F.3d 350, 353 (8th Cir. 1995) (stating that defendant's mistaken belief that he had been promised leniency would not render confession involuntary); *Winfrey v. Wyrick,* 836 F.2d 406, 411-12 (8th Cir. 1987) (concluding that defendant's murder confession was voluntary even though defendant was encouraged to talk because of erroneous *belief* that if the shooting was accidental it would negate an element of the offense), *cert. denied,* 488 U.S. 833, 109 S.Ct. 91, 102 L.Ed.2d 67 (1988).

Moreover, even assuming that a reasonable person would view the agents' statements as a promise, a promise made by law enforcement officers is only one relevant consideration in assessing police conduct *561 and does not render a confession involuntary per se. *See Simmons v. Bowersox,* 235 F.3d 1124, 1133 (8th Cir. 2001), *cert. denied,* 534 U.S. 924, 122 S.Ct. 280, 151 L.Ed.2d 206 (2001); *see also Tippitt v. Lockhart,* 859 F.2d 595, 598 (8th Cir. 1988) (holding that a custodial statement given in exchange for a promise that the

defendant would not be charged with capital felony murder "was the product of his rational and voluntary decision and that the officers' promise did not coerce or overbear his free will"), *cert. denied,* 490 U.S. 1100, 109 S.Ct. 2452, 104 L.Ed.2d 1007 (1989). Thus, in *United States v. Larry,* 126 F.3d 1077 (8th Cir.1997), we held that the defendant's statement implicating himself as being a felon in possession of ammunition was voluntary even though it was induced by a promise that the defendant would not be prosecuted for a separate offense involving a drive-by shooting. *Id.* at 1079. After viewing the interview videotape, I do not seriously doubt that the discussions concerning nonprosecution were the but-for causes of LeBrun's confession. That is, LeBrun might not have confessed absent the discussion not to prosecute. The Court has indicated, however, that in the context of determining the voluntariness of a confession, a but-for type analysis is inadequate. *Schneckloth v. Bustamonte,* 412 U.S. 218, 224, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ("Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind."). Instead, courts must look at the totality of the circumstances surrounding the confession and balance the complex of values implicated in questioning a subject. Even accounting for any potentially coercive impact that Agent Early's and Agent Grebas's statements might have had on LeBrun, I conclude that his confession was freely and voluntarily made and was not the product of unconstitutional compulsion.

I place substantial weight on the fact that LeBrun confessed after a mere thirty-three minutes of conversation with the agents. Thus, this is not a situation where the agents wore down a defendant's will with persistent questioning over a considerable length of time. I also place significant weight on the fact that LeBrun testified that he had a subjective

understanding of his *Miranda* rights at the time of the interview. (R. at 61.) *See Simmons,* 235 F.3d at 1133-34 (stating that a particularly compelling fact militating in favor of finding a voluntary confession was that defendant understood his rights). I also place substantial weight on the fact that LeBrun was a sophisticated individual with legal training. As we have noted, "one of the key concerns in judging whether confessions were involuntary, or the product of coercion, [is] the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne." *Wilson v. Lawrence County,* 260 F.3d 946, 952 (8th Cir.2001).

LeBrun did not display any unique sensitivity that would indicate the police might overbear his will. LeBrun had met with NCIS investigators on four prior occasions. The videotape demonstrates that LeBrun was aware of his surroundings and the circumstances confronting him. In fact, as LeBrun and the agents discuss the potential statute of limitations problems, LeBrun becomes more animated and much more interested in the interview. After watching the videotape, I conclude that LeBrun is an intelligent, calculating person who erroneously perceived a potential "out" or loophole in the prosecution's case and tried to take advantage of it by confessing to "spontaneous" murder. Whatever his motivation, we rarely conclude, absent physical coercion, that a confession *562 was made against a person's free will unless the person is of extremely low intelligence or otherwise impaired. *Compare Wilson,* 260 F.3d at 953-54 (affirming denial of qualified immunity on coerced confession claim where defendant was mentally handicapped), *with Astello,* 241 F.3d at 968 (recognizing fact that defendant had completed eleventh grade and was generally mature supported a finding that statement was voluntary); *Simmons,* 235 F.3d

at 1133-34 (finding confession of juvenile defendant with full scale IQ of 88 was voluntary where officers interrogated him for over two hours, threatened him with the death penalty, and lied about the evidence against him); *Tippitt,* 859 F.2d at 598 (concluding that confession of defendant with eleventh grade education was voluntary even though it was given in exchange for promise not to pursue capital sentence); *Winfrey,* 836 F.2d at 408 (finding confession voluntary where defendant had dull-normal IQ and mental age of 14 or 15), 411 (collecting cases). The court's decision departs from the general trend of our cases. Accordingly, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA	*	
Plaintiff,	*	
v.	*	No. 01-0088-CR-W-1
MICHAEL E. LeBRUN	*	
Defendant	*	

ORDER

Pending before the Court is the government's objections to the magistrate's report (doc. 55) recommending the suppression of defendant Michael LeBrun's confession in this murder case.[1] On April 27, 2001 the magistrate[2] held an evidentiary hearing focusing on the voluntariness of LeBrun's September 21, 2000 confession to Naval Criminal

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[1]The magistrate's report addresses the issues raised in Defendant's motion to suppress out-of-court admissions (doc. 14); the government's response to that motion (doc. 18); Defendant's reply (doc. 20); Defendant's amended motion to suppress (doc. 22); suggestions in support of the amended motion, including the Defendant's supplementary affidavit (doc. 29); and the amended motion (doc. 35).

[2] The Honorable Sarah W. Hays, United States Magistrate Judge for the Western District of Missouri.

Investigative Services ("NCIS") agents. On September 14, 2001 the magistrate issued a report which made extensive factual findings and found that LeBrun's September 21, 2000 statements were involuntary. The government timely objected to the magistrate's conclusions and asked this Court to hear oral argument in the matter. This Court declined to hear oral argument, but on October 26, 2001 conducted an evidentiary hearing on the issue of whether LeBrun was in custody for *Miranda* purposes on September 21, 2000. The Court ordered the hearing to give the government the opportunity to respond to, and present evidence on, the issues raised in LeBrun's supplementary affidavit, and to give the Court the opportunity to assess the witnesses' credibility.

After holding an evidentiary hearing, reexamining the relevant law, and conducting an independent review of the record, including watching the entire videotaped interrogation, the Court makes the following rulings. LeBrun was in custody for *Miranda* purposes once NCIS investigators began questioning him in the interrogation room of the Highway Patrol building. NCIS investigators failed to advise LeBrun of his *Miranda* rights, therefore his statements made while in custody should be suppressed. With respect to the voluntariness of LeBrun's confession, the Court finds that the government has failed to prove by a preponderance of the evidence that his statements were made voluntarily. On the contrary, it appears that the NCIS agents gradually overwhelmed LeBrun's will by questioning him in a police-dominated atmosphere, lying about the evidence against him, threatening him that his family would be ruined unless he confessed, promising him he would not be prosecuted if he confessed, and masquerading an NCIS agent as the victim's brother who was suffering from cancer. Consequently, Lebrun's statements to the investigators were not voluntary and must be excluded. Finally, the Court affirms the

magistrate's findings that Mary Lou Taylor was an agent of the government during the September 21, 2000 interrogation, and so any unmirandized or involuntary confessions made in her presence should also be excluded.

I. FINDINGS OF FACT

Background

1. In January of 1968, U.S. Naval Ensign Andrew Muns and Michael LeBrun were shipmates aboard the U.S.S. Cacapon. Both worked in the disbursement office; Muns was the disbursing officer and LeBrun the clerk. Muns disappeared from the ship while it was moored in Subic Bay, the Phillippines, sometime during the late evening of January 16 or early morning of January 17, 1968. Tr. at 6-8.[3] Shortly after Muns disappeared, approximately $8,600 was discovered missing from the disbursement office. The Navy investigated and concluded that Muns had stolen the money and deserted. Mun's family never accepted the Navy's findings, and in August of 1998 Mun's sister convinced Special Agent Peter Hughes of the Naval Criminal Investigative Service ("NCIS") Cold Case Homicide Unit to re-open the investigation. Tr. at 6; D-2 at 13.

1999 Interviews

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[3] "Tr." refers to the transcript of the April 27, 2001 hearing, "T." refers to the October 26, 2001 hearing transcript, "D-2" refers to the transcript of the November 21, 1999 interview, "E-1" refers to the videotape of the September 21, 2000 interview, and "E-2" refers to the transcript of the September 21, 2000 interview.

2. In 1999, NCIS agents interviewed defendant LeBrun on four separate days - November 17, 19, 20 and 21, 1999. Tr. at 44.

3. Special Agent Peter S. Hughes called LeBrun on November 15, 1999 to arrange an interview. Hughes told LeBrun that he was conducting a security clearance background investigation on people that LeBrun worked with in the service. He asked LeBrun to meet with him in Gardner, Kansas Police Department on November 17, 1999. Tr. at 9. LeBrun agreed. When LeBrun arrived for the meeting, Hughes apologized for misleading him and explained that he was there to talk with him about the disappearance of Ensign Muns and the money. Tr. at 11.

4. The interview lasted almost five hours. Tr. at 15. During the interview, Hughes explained to LeBrun that he was not under arrest, that he was free to go, and that he did not have to answer any questions. Tr. at 13. The tone of the interview was conversational. Tr. at 14. LeBrun provided Hughes with background information including information about his education, his naval career, and his current employment. Tr. at 12-15. When asked about the events of January 16 and 17, 1968, LeBrun's answers were vague and he stated he did not remember much. Tr. at 12-13. At some point during the conversation, Hughes said that there was no statute of limitations for murder. Tr. at 14. At the conclusion of the interview, LeBrun was asked to submit to a polygraph examination and he agreed.

5. On November 18, 1999, Agent Hughes phoned LeBrun and they set-up the polygraph examination for the following day. Hughes had arranged for a polygraph examiner to be flown in from Washington, D.C. Tr. at 15-16.

6. On November 19, 1999, LeBrun drove himself to Kansas Bureau of Investigations (K.B.I.) Offices for the polygraph examination. Tr. at 16-17. The polygraph examiner, Special Agent Denton Carter, advised LeBrun of his *Miranda* rights[4] pursuant to strict guidelines under which NCIS polygraph examiners work. Tr. at 18-19, 39. Agent Carter met with LeBrun for approximately four hours, interviewing him prior to conducting the polygraph test. Tr. at 19. Carter did not complete the polygraph examination that day and asked LeBrun to return the following morning. Tr. at 20-21.

7. On November 20, 1999, LeBrun drove himself to K.B.I. headquarters to complete the interview. Agent Carter again advised LeBrun of his *Miranda* rights. LeBrun waived those rights and agreed to speak with the agents. Tr. at 21. LeBrun was extremely cooperative and told the agents he realized he may be involved in the death and disappearance of Muns and the money. Tr. at 23. LeBrun provided a couple of different scenarios as to what could have happened and how he would have been involved. LeBrun felt he had repressed memories and asked Special Agent Hughes if he knew of a therapist who might help him draw out the information. Tr. at 24.

8. On November 19 and 20, 1999, LeBrun executed a Civilian Suspect Acknowledgment and Waiver of Rights Form. Gov. Exs. A and B.

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[4] "Miranda rights" are the warnings given to a suspect informing him that he has the right to remain silent, anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be provided to him prior to questioning if he so desires. *Dickerson v. United States*, 530 U.S. 428, 435 (2000).

9. On November 21, 1999, LeBrun met again with Agents Hughes and Carte, this time at the Olathe Police Department. This meeting was videotaped. Tr. at 25-26; D-1; D-2. Prior to the interview, Special Agent Carter advised LeBrun of his *Miranda* rights, and LeBrun executed a Civilian Suspect Acknowledgment and Waiver of Rights Form. LeBrun was not, however, given a polygraph test. Tr. at 28, 39-40, 77 and Gov. Ex. C.

10. At the conclusion of the interview, LeBrun indicated that he wanted to see if he could recover his repressed memories and agreed to stay in contact with Hughes. Tr. at 37. LeBrun suggested they see another appointment for "three weeks from now or something, " and told Hughes to "Check your schedule and give me a call." D-2 at 61.

11. Agent Hughes called LeBrun on December 16, 1999 to check in with him and see how he was doing. Tr. at 33-34. Hughes did not speak with Lebrun again until after LeBrun confessed on September 21, 2000.

Interview of September 21, 2000

12. In the fall of 2000, at least two weeks prior to September 21, NCIS agents decided to interview LeBrun again. Tr. at 43. At that time, LeBrun was the leading suspect in the disappearance of Ensign Muns. Tr. at 43.

13. Hughes and other NCIS agents, including Special Agents Jim Grebas and David Early, engaged in "quite a bit" of planning for how the next interview would be conducted. Tr. at 44.

14. The agents wanted this interview to have the feel of a formal interrogation. Tr. at 45.

15. Several days prior to September 21, Grebas visited LeBrun's workplace in Oak Grove, Missouri and posed as a customer to obtain information about LeBrun. Tr. at 47.

16. Also prior to September 21, NCIS investigators had a "tactical discussion" concerning whether it was to their advantage to read Mr. LeBrun his rights when they interviewed him. They decided to take "whatever measures" they could to avoid reading LeBrun his rights in order to give them a better chance at getting a confession. Tr. at 126, 169.[5]

17. The agents also decided to have LeBrun picked-up at his workplace and driven to the Missouri Highway Patrol office in Lee's Summit. The agents decided not to allow Lebrun to drive himself to the station even though they believed that LeBrun would meet them if they asked and that he was not a flight risk. The agents were aware that LeBrun had voluntarily come to all previous interviews. Tr. 44-45.

18. The agents decided to have Grebas and Early, agents LeBrun had never met, conduct the questioning at this interview. Tr. at 43-44.

19. The agents decided to question LeBrun in the station's interrogation room and arranged to have enlarged photographs of LeBrun's family, house, his shipmates, the U.S.S. Cacapon, and other scenes from LeBrun's life placed in the walls so that LeBrun would be confronted by these

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[5] Although Agent Hughes denied that the agents choose not to read LeBrun his rights so that they would improve their chances of getting LeBrun to confess (Tr. at 126-129), Hughes testimony on this point is not credible. Hughes testimony was evasive, inconsistent with the record as a whole, and inconsistent with Agent Grebas' testimony.

images when he walked into the room. Tr. at 139, 158, 165; E-1.

20. The agents also arranged to have Ensign Mun's sister flown in from Milwaukee, at the government's expense, so she would be available to talk with LeBrun at this interview if doing so would make LeBrun more likely to confess. Tr. at 62-63, 169.

21. After the workday started on September 21, Agent Early and Corporal Hunter of the Missouri Highway Patrol drove to defendant's place of employment. Tr. at 47, 189. Early and Hunter walked into LeBrun's office. LeBrun had no prior notice that the officers were coming or that they wanted to question him. Hunter identified himself but Early did not. Tr. at 189; T. at 6. Hunter told LeBrun they were conducting an investigation and asked him to accompany them. LeBrun asked what it was about and the officers said they could not tell him, but that it had nothing to do with his family and that his family was fine. LeBrun agreed to go to the station. Tr. at 102, 190; T. at 6.

22. At this time Lebrun did not know that the authorities wanted to speak with him concerning the Muns matter. LeBrun speculated that the men were part of an investigation by the State of Missouri and the F.B.I. in to allegations that LeBrun's employer, a real estate developer, had filled two retention ponds with city water. T. at 7.

23. When the three left the building the officers said, "Hop in and we will give you a ride." LeBrun offered to drive himself and the officers said "No, we would prefer you ride with us." Tr. at 19; T. at 15. LeBrun rode with the officers. LeBrun rode to the station in the front passenger seat of an

unmarked highway patrol car. Tr. at 100, 103. LeBrun was not locked in the car or restrained in any way. T. at 6.

24. Early and Hunter were dressed in plain clothes. Each carried a firearm, but their weapons were not easily visible. Tr. at 100. LeBrun saw that Hunter was armed. Tr. at 191; T. at 15-16.

25. During the drive to the Lee's Summit Highway Patrol station it occurred to LeBrun that the authorities could be trying to interview him about Ensign Muns disappearance. LeBrun believed that this was not the case because on prior occasions when NCIS investigators had wished to speak with him that they had contacted him and scheduled an appointment ahead of time. Furthermore, he had previously arranged meetings through Agent Hughes, and Hughes has not called him. T. at 7.

26. After arriving at the station, before they went inside, Agent Early told LeBrun that he was not under arrest and that he was free to terminate the interview and leave the building at any time. Tr. at 104, 187; T. at 11. Early also advised LeBrun that he was subject to audio and video recording anywhere inside the building. Tr. at 104. Early had not yet identified himself as an NCIS investigator or told LeBrun that he wanted to question him about Ensign Muns's disappearance. T. at 11-12.

27. LeBrun "generally understood" what his *Miranda* rights were at this time even though they were not read to him. T. at 14; Tr. at 191, 196.

28. Early took LeBrun to a room inside the station for questioning. Someone videotaped the interview from behind a one-way mirror in an adjacent room. The videotape shows

the questioning took place in a rectangular, windowless room the dimensions of which are difficult to discern. The walls of the room were covered with more than twelve enlarged photographs showing scenes from LeBrun's life, including pictures and drawings of the U.S.S. Cacapon, his shipmates, his present family, and his home. The agents referred to the photographs during the interview, often raising their voice and changing their tone when doing so. The room held three chairs and a small table which stood next to a wall. E-1.

29. The agents seated LeBrun with his back to the wall. The chair had no rollers on the legs which would permit an occupant to move around the room in the chair, or armrests. The agents sat in adjustable chairs that had armrests and rollers on their legs. During the interview the agents would occasionally move around the room to gesture to a picture. The agents sat on either side of LeBrun facing him. They would occasionally roll closed to him to make a point. There was no furniture or desks separating LeBrun from the officers. E-1 at 11:26 a.m.

30. The agents never shouted at LeBrun during the interview. E-1 at 11:06 a.m. (E-2 at 15); E-1 at 11:26 a.m. (E-2 at 38).

31. After seating Lebrun in the interrogation room Agent Early identified himself as an NCIS investigator. E-1 at 10:43 a.m. (Early identifies himself on videotape, E-1 at 10:43 a.m., however this fact is not reflected in the transcript , E-2, because the transcript does not start until 10:44 a.m., after the videotape had been recording for several minutes.) Agent Grebas entered the room and began the interview a short time later. E-1 at 10:44 a.m.

32. Neither Early nor Grebas were armed while in the

interview room. Tr. at 114-115.

33. At the start of the interview LeBrun believed he could leave if he wanted to, but as the interview progressed he began to believe he was not free to leave despite what the agents said. T. at 21-22.

34. Early on during the questioning, Early and Grebas told LeBrun he was the prime suspect in LeBruns death. E-2 at 1-4. Agent Early said, "There is absolutely no doubt that you were responsible for Ensign Muns death. Absolutely no doubt about it. I know you know that. I know you believe it. I believe it." E-2 at 4. "You were responsible for Andy Muns death." E-2 at 18. According to the agents, the only question was whether Mun's death was premeditated or spontaneous. E-2 at 4, 6.

35. The agents told LeBrun that the United States Attorney in Anchorage, Alaska, was prepared to file charges against him for premeditated murder of Andrew Muns. E-2 at 1-4. The agents, however, had already been advised by the U.S. Attorney's Office in Alaska that unless a case could be made against Jerry Hahn, a suspect living in Alaska, it would not prosecute the case. Tr. at 58.

36. The agents told LeBrun that unless he admitted to a "spontaneous murder" he would be extradited to Alaska and tried for murder. They told him that such a trial would pull him away from his family, leave his pregnant wife alone, drain his family's finances, ruin his reputation, and ruin his family's reputation. E-2 at 4-7, 10, 13, 17.

37. Special Agent Grebas told LeBrun that he and Early

controlled whether LeBrun would be prosecuted. Grebas knew that the agents did not control the decision to prosecute. Tr. at 167.

38. Early and Grebas told LeBrun that after this trial, Muns's wealthy family would file a civil suit against him and ruin his family's name. They also said there would be a media frenzy, and insinuated that LeBrun's family's life would be ruined like Jon-Bonet Ramsey's family. E-2 at 12, 13, 17.

39. The agents told LeBrun if he admitted to a spontaneous" killing, that would be the end of it. E-2 at 16-17.

40. Early and Grebas told LeBrun that they had a suicide note written by one of his shipmates, and they intimated that the note incriminated LeBrun in Muns's death. E-2 at 7-9. They also told him that two other shipmates had severe emotional problems because of what they had witnessed him do. E-2 at 14-15. Grebas described the evidence against LeBrun as "incontrovertible." E-2 at 18.

41. In fact, Grebas did not have any such note or evidence. Tr. at 160. Grebas admitted "exaggerating" the strength of the evidence against LeBrun. Tr. at 145.

42. During the questioning, the agents cast blame on Ensign Muns, apparently in an attempt to gain LeBrun's confidence. Agent Grebas told LeBrun, "You know, I didn't like Andy Muns and you didn't like Andy Muns. Why? Because you were that person on the ship. You ran that disbursing office. You had done your time and then in comes that boot officer. You know what, he was a snotty-nosed kid who probably didn't deserve to wear an officer's uniform." Tr. at 16.

43. The agents also used the "Mutt and Jeff"[6] interrogation tactic. E-1; Tr. at 11, 15.

44. The agents acknowledged that they tried to use psychological pressure to obtain a confession. Tr. at 144-145. The agents talked about LeBrun's family and the cost of trial because LeBrun had identified those things as important to him during the 1999 interviews. Tr. at 145.

45. The agents' words, body language, and tone of voice gave the general impression that the questioning would continue until LeBrun confessed. The transcript, which does not capture the full flavor of everything that was communicated, records the following exchanges.

> **GREBAS:** We are here, we are here to tell you that we don't want someone else's life ruined, especially, Michael, especially if it was spontaneous. I am like, let's take this thing and let's go. We don't need to do this, right. I have got a family I would rather be at home with right now. I work out of Washington, D.C.

E-2 at 9. A few minutes later

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[6] This ploy has also been called the "friendly-unfriendly" or "good cop-bad cop" technique. One investigator plays the sympathetic questioner, the other the hard-nosed questioner. The object is to make the suspect believe the sympathetic questioner is on his side, and so gain the suspect's confidence. *Miranda v. Arizona*, 384 U.S. 436, 452 (1966).

EARLY: That tells me something about you. That tells me something about you that I don't even know whether I should waste my time on you. I, I, what you need to understand is that you can put an end to this today.

E-2 at 15. The agents also told LeBrun, "We are here because of you." *Id.* And finally:

GREBAS: ...[voice rising] We don't care. I don't care. You know what? When you say, "You know what, Special Agent Early, I killed him." You know what? We can stop. Because you know why, you can say this, it wasn't premeditated. It was spontaneous. That's all you need to say and we are done. We've got all the why.

E-2 at 16-17

46. Special Agent Grebas told LeBrun that Muns's sister was at the Highway Patrol office and that if LeBrun said to her, "It was spontaneous. I didn't mean to kill him. If I could take it back, I would," she would forgive him. Grebas also told LeBrun that Muns's sister knew that his wife was pregnant and she didn't want to ruin his family's life. E-2 at 20.

47. Special Agent Grebas told LeBrun that if he confessed

to a spontaneous killing, "It's possible, beyond possible, you won't be prosecuted at all. And I want to throw-up when I say that, but I will - that's my word to you." Special Agent Early gave the impression that Grebas was correct, saying "Absolutely." E-2 at 20.

48. A few seconds later the agents promised LeBrun that he would not be prosecuted. Initially the agents made an absolute promise of non-prosecution, and then Special Agent Early qualified it. LeBrun appears to have confessed in reliance on this promise, or apparent promise, of non-prosecution. The exchange was as follows:

LeBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LeBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That is absolutely right.

LeBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LeBRUN: It was spontaneous.

EARLY: Okay

GREBAS: So it was, let me get this clear. It was spontaneous?

LeBRUN: Correct.

GREBAS: If this is true, then you killed him and it was over, it was over the money; is that right?

LeBRUN: I don't know what it was over.

E-2 at 21-22.

49. After additional questioning, LeBrun described to the agents how he discovered that Muns had accidentally left the safe unlocked, and how he waited until he thought no one would come in to the disbursing office before he started taking money from the safe. LeBrun confessed that Muns walked in on him while he was taking money out, and that he panicked and killed Muns during a struggle. E-2 at 24-38, 48-60. I response to more questioning LeBrun told the agents he disposed of Muns's body and the money in a tank filled with caustic fuel. E-2 at 38-41, 60-63.

50. During this time, Grebas and Early warned LeBrun that if he was not being "100 percent honest" he would go to prison for five years. E-2 at 40-41. The agents also told him, "We told you if it wasn't premeditated and it was spontaneous and the statute of limitations has run you will not be prosecuted," to which LeBrun replied, "Right." E-2 at 41.

51. When Special Agents Grebas and Early were comfortable

with LeBrun's confession, Special Agent Hughes joined them and they questioned LeBrun about whether any shipmates assisted him or whether he confided in anyone. LeBrun told them that he acted alone and that he confided in no one. E-2 at 66-72, 74. The agents appeared to be satisfied that LeBrun's confession was candid. Tr. at 25-62.

52. The agents asked LeBrun if he wished to apologize to Muns's sister. LeBrun asked if she wanted the opportunity and was told "she does." E-2 at 79.

53. Muns' sister, Mary Lou Taylor, and special Agent Billington then entered the interrogation room. Billington represented to LeBrun that he was the victim's brother. Tr. at 62-64; E-2 at 81. LeBrun acknowledged responsibility for Muns's death and apologized. E-2 at 80-81. During this meeting LeBrun was emotional; he cried while apologizing and asked Taylor if he could hug her. E-1 at 12:44 p.m.; E-2 at 79, 81.

54. Posing as Muns's brother, Billington told LeBrun, "it is important to us that we do learn everything about Andy because we want to know. That's all we want." E-2 at 81.

55. Agent Hughes had told LeBrun in November of 1999 that Muns' brother had "advanced cancer," was living on "borrowed time," and his goal was to learn his brother's fate before he died. At the time he met Muns's "brother," LeBrun was recovering from a bout with colon cancer in the previous year. D-2 at 7-9.

56. When LeBrun asked if he could call the family as he remembered more about the incident, Grebas told LeBrun that he should communicate with Muns's family through him. Taylor and Billington then left. E-2 at 81.

57. At the conclusion of the interview LeBrun consented to a search of his house. E-2 at 83.

58. The interview lasted for approximately two hours and was videotaped. Tr. at 107; E-1 and E-2. At no time before or during the interrogation was LeBrun given his *Miranda* warnings. Tr. at 169, 186.

59. During the interview, with the agents' permission, LeBrun was allowed to take a restroom break, have a cup of coffee, take a cigarette break, and use his cell phone to call his wife. Tr. at 107-08; E-2 at 77, 81.

59. During the bathroom break, Special Agent Early accompanied LeBrun into the bathroom and stood by the door while LeBrun used the facilities. The agent did not use the bathroom.[7] LeBrun felt he was watching him. T. at 8-9, 18.

60. Early also accompanied LeBrun when he went outside for a cigarette break. Early did not smoke. When LeBrun finished smoking both men went back inside.[8] T. at 9.

61. LeBrun never asked to talk to an attorney and never

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[7] Agent Early claims he used the facilities, finished first, washed his hands, and then waited inside the bathroom for LeBrun. T. at 27. The Court finds LeBrun's account to be more credible. Even though he had enormous motivation to lie, his testimony was simply more sincere.

[8] Early claims he accompanied LeBrun outside to ensure he would be able to get back into the building and to ensure that LeBrun would not hurt himself or someone else. T. at 28. Again, the Court finds LeBrun's account more credible.

asked to stop the interview. Tr. at 106. The agents never told LeBrun that he could talk to an attorney. E-2.

62. No physical threats were made to the defendant and any promises made to him are recorded on the videotape. Tr. at 109; E-2; T. at 17.

63. After the interview ended, the agents drove LeBrun to his house and then searched it. Tr. at 145-146. During the search the agents asked LeBrun to stay in the company of an agent at all times and not to wander around the house. When LeBrun wanted to use the bathroom, an agent asked him to use the downstairs bathroom near where the agents were conducting the search. T. at 10-11.

64. After they were finished, the agents left LeBrun at home. Tr. at 145-46. LeBrun was not arrested that day. T. at 19.

65. LeBrun was in his fifties during September of 2000. During his lifetime he had attended four or five years of college, but had not graduated, and had attended one year of law school at the George School of Law in Sacramento. Tr. at 194. At the time of September 21, 2000 interview, LeBrun was a sales manager for a housing developer, recently married and his wife was pregnant, and he was recovering from colon cancer. Tr. at 195; E-2 at 10. Prior to this case, LeBrun had no previous contact with law enforcement officers. Personal Affidavit of Michael LeBrun at 3, ¶ 8; D-2 at 65.

66. NCIS agents were aware of this personal information. Tr. at 13-14; D-2 at 7, 65-66; E-2 at 10.

67. A the time of the interrogation, NCIS regulation required agents to give warnings to civilian suspects when they were in custody. NCIS regulations define custody as when a

suspect is under arrest, that is, when the suspect is not free to leave on his own will. Tr. at 38.

II. LEGAL ANALYSIS

LeBrun argues that he should have been read his *Miranda* rights prior to being questioned on September 21, 2000. He also asserts that his confession was involuntary. The government argues that the NCIS agents did not have to read LeBrun his rights because he was not in custody, and that his confession was voluntary under Eight Circuit Law. The magistrate's report concluded that LeBrun's confession was involuntary, but did not reach the issue of whether LeBrun was in custody. The Court resolves the *Miranda* question first.

1. Miranda analysis

The Fifth Amendment requires law enforcement officers to administer *Miranda* warnings to those subjected to custodial interrogation. *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *Miranda v. Arizona*, 384 U.S. 436, 443 (1996). A suspect is in custody not just upon formal arrest, but under any other circumstances where the suspect is deprived of his freedom of movement. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). To determine whether a suspect is in custody the court must consider the "totality of the circumstances" and how a reasonable man in the suspect's position would have understood his situation. *United States v. Hanson*, 237 F.3d 961, 963 (8th Cir.2000). This judgement turns on the objective circumstances of the interrogation, not the subjective views of either the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 323 (1994). In making this determination courts look to the following factors: the place, purpose and length of the

interrogation, the suspect's freedom to leave the scene, and other indicia of custody. *United States v. Griffin*, 922 F.2d 1348 (8th Cir.1990). "Other indicia" include:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesed to official requests to respond to questions; (4) whether strong arm tactics of deceptive strategems were employed during questioning; (5) whether the atmosphere of questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of questioning.

Id. at 1349. This is not an exhaustive list, however. The Eight Circuit has recognized that "the available means of coercion are as vast as the circumstances in which it may arise." *Id.*

The location of an interview is a "relevant but not controlling" factor in determining the existence of custody. *Feltrop v. Bowersox,* 91 F.3d 1178, 1181 (8th Cir. 1996). Since *Miranda* focused on the inherently coercive aspects of station-house interrogation, courts often find custody where the interview occurs in a police building. Interviews that take place inside a police station are not automatically custodial though. The critical factor is whether the suspect has freedom of movement during the interrogation. *Id.* Indeed, a suspect can be in custody when questioned in his own home and yet

not be in custody when questioned at a police station, depending on the suspect's freedom of movement. *Griffin*, 922 F.2d 1343, 1348 (holding suspect questioned in his own home in custody.)

In this case LeBrun did not have unrestrained freedom of movement once the questioning began. LeBrun had to ask the agent's permission to use the bathroom, take a smoke break, or call his wife. In addition, at least one agent constantly accompanied LeBrun the entire time he was at the Highway Patrol building, even when he went to the bathroom or took a smoke break. Any reasonable person in his situation – confronted at work by unknown law enforcement officers, brought to a police station in a police car, questioned about a murder in a windowless interrogation room, and then accompanied to the bathroom and outside the police station on a smoke break — would feel like he had been arrested. Even if Agent Early had some reasonable explanation unrelated to custody for why he monitored LeBrun in the bathroom, he did not share it with LeBrun, and the relevant question is not the agents' intention, but the effect on the suspect. *Berkemer*, 468 U.S. at 422. Early reinforced this feeling of being under guard when, for no apparent reason, he accompanied LeBrun outside during the smoke break. Although Early, a nonsmoker, claims he accompanied LeBrun for benign reasons, to ensure that LeBrun would be safe and that he would not get locked out of the building, Early never communicated these reasons to LeBrun.

LeBrun also did not have freedom of movement because he was dependent on the authorities for a ride home.[9] The reason LeBrun did not have his car at the station is that Agent Early and Corporal Hunter discouraged him from driving himself. Consequently, when LeBrun learned why the agents brought him to the station — to confess — and he realized that he could not leave the station without the agents help, a reasonable person in the situation would have believed that the officers had deliberately curtailed his movement. Consequently, the Court finds that a reasonable person who was questioned at the Highway Patrol building under the above conditions would believe he was in custody.

The government argues that the result in *Oregon v. Mathiason,* 429 U.S. 492 (1977) and its progeny control. In *Mathiason* a police officer left a note and a business card on the apartment door of a suspected thief asking him to please call him. The suspect received the message, telephoned the officer, and made an appointment to meet him at a patrol station two blocks away. In a building that housed several state agencies. The defendant walked into the station unescorted and met the officer inside. The two went to a furnished office and spoke briefly. The defendant admitted taking the property in less than five minutes and after virtually no questioning. *Id.* at 493. Throughout the entire interview the defendant's freedom to leave was never restricted. *Id.* at 495. After observing that the defendant initiated contact with the authorities, that the interview did not feel like a station-house interrogation, that the questioning was brief, and that

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[9] The Court takes judicial notice of the fact that the straight line distance between Oak Grove, Missouri and Lee's Summit, Missouri is at least thirteen miles and that no public transportation links the two. Furthermore, nothing in the record indicates that LeBrun had any other means of returning home other than being driven by the agents.

the defendant's freedom to leave was never restricted, the Supreme Court held that the defendant was not in custody. *Id.*

The Eight Circuit applied *Mathiason's* reasoning to similar facts in *United States v. Jorgensen*, 871 F.2d 725 (8th Cir.1989). In *Jorgensen* an F.B.I. agent asked a suspect to submit to an interview, and allowed the suspect to choose the time and place of the interview and to bring his brother with him for support. Ths suspect decided to be interviewed a week later at the local F.B.I. headquarters located in the middle of a large commercial office building. The actual questioning took place in a supervisor's office there. During the interview the defendant enjoyed complete freedom of movement at all times, he was even permitted to go to an unlocked, unguarded section of the office to speak with his brother. *Id.* at 726-27, 729. After finding that the defendant chose where and when he would be interviewed, the atmosphere did not resemble a stationhouse interrogation, and—most importantly—that the suspect had complete freedom of movement at all times, the court held the defendant was not in custody.

The Court finds the facts in the present case are distinctly different from those in *Mathiason* and *Jorgensen* in three crucial ways.

First, as discussed above, LeBrun did not have the unrestrained freedom of movement during his interrogation that the suspects in *Mathiason* and *Jorgensen* enjoyed.

Second, LeBrun was not given the opportunity to decide where or when he would be interviewed. NCIS investigators did not call ahead before the September 21, 2000 interview, they simply appeared at LeBrun's work place and asked him

to go with them. Although the government suggests that in November of 1999 LeBrun invited the agents to contact him in the future, the Court finds that LeBrun never invited the government to do what it did here, namely, send two unknown investigators to appear at his workplace unannounced. On the contrary, in November of 1999 LeBrun asked Agent Hughes to contact him in the near future to schedule another interview, nothing more. Furthermore, although LeBrun went along with the officers to the Highway Patrol, he did not know what he was getting into because the agents schemed to keep him ignorant. Agent Early chose not to identify himself, apparently so LeBrun would not know he was an NCIS investigator, and the officers refused to tell him why they wanted to speak with him at the Highway Patrol building. Based on LeBrun's prior experiences with NCIS agents and recent events at work, when LeBrun got into the officers' car he reasonably believed he was going with the authorities to talk about retaining ponds, not Muns' disappearance. Consequently, the Court cannot find that LeBrun was allowed to choose the time and place of his interrogation like the defendants in *Mathiason* and *Jorgensen*, or that his appearance was otherwise voluntary.

Third, the atmosphere surrounding the interrogation is different in this case. In *Mathiason* and *Jorgensen* the questioning took place amid surroundings that felt more like office buildings than police stations. The place if interrogation here, however, was a Highway Patrol building. Additionally, once inside the Highway Patrol building the agents questioned LeBrun in a room that felt like an interrogation room; indeed, it felt that way because it *was* an interrogation room. It had a one-way mirror, no windows, little furniture, props attached to the walls, and the agents were firmly in control. The Court also notes that the agents admitted that they wanted the questioning to feel like a formal

interview. Consequently, unlike in *Mathiason* and *Jorgensen*, there was nothing in the atmosphere here which would suggest to a reasonable person that he was doing something other than undergoing a custodial interrogation.

Of course this is not the end of the analysis, the Court must also look at the purpose and length of the interrogation and other indicia of custody. Although they do not weigh heavily in the analysis, the purpose and length of the interrogation weigh in favor of finding custody. *Griffin*, 922 F.2d at 1348.

By itself, the fact that the purpose of the interview was to get LeBrun to confess is irrelevant. That an individual is the focus of an investigation is relevant only "to the extent that the suspect is aware of the evidence against him and this contributes to his sense of custody." *Id.* Here Agent Early told LeBrun, "There is absolutely no doubt that you were responsible for Ensign Muns death. Absolutely no doubt about it. I know you know that. I know you believe it. I believe it." In addition, Agent Grebas told LeBrun the agents had "incontrovertible" evidence implicating him, including eyewitness accounts. Consequently, shortly after the interrogation began LeBrun became aware that the purpose of the questioning was to get him to confess.

Similarly, the length of interrogation factor was in favor of custody. A suspect can be in custody during relatively brief interrogations if he is aware that questioning will continue until he provides satisfactory answers. *Id.* (citing *Berkemer*, 468 U.S. at 439). Here the interrogation was relatively brief, two hours, but the agents intimated to LeBrun that he was going to be there until he confessed. They repeatedly told him, "We are here because of you," "You were responsible for Andy Muns death." and "you can put an

end to this today." Shortly before he confessed they told him, "You know what? When you say, 'You know what, Special Agent Early, I killed him.' You know what? We cant stop. . . That's all you need to say and we are done." During this same time the agents' body language and tone of voice became correspondingly adamant. For these reasons, the Court holds that the cumulative effect of the agents' words and demeanor was to make a reasonable person feel like the questioning would continue until he confessed.

Finally, the Court looks at the other indicia of custody. The first mitigating factor is that prior to entering the Highway Patrol building, Early told LeBrun he was not under arrest and that he was free to end the interview and leave the building at any time. While the fact that an officer gave such advice to a suspect is an important factor to consider, it is not dispositive. *Griffin*, 922 F.2d at 1350; *Hanson*, 237 F.3d 961, 965 (8th Cir.2001) (finding custody despite clear warning that the defendant was a suspect, was not under arrest, and was free to leave where other circumstances indicated custody). Indeed, if it were dispositive then an officer could avoid reading a suspect his full rights simply by telling him "You are not under arrest and you are free to leave at any time" before walking into the interrogation room, and *Miranda* would become meaningless.

The second indicia is whether the suspect was placed under arrest at the conclusion of the interview. Although LeBrun was not arrested immediately following his confession, this fact is not particularly significant here. While a post-interview arrest often indicates that the police were attempting an "end run" around *Miranda* and give objective support to the reasonableness of the defendant's belief that he was in custody, *Griffin*, 922 F.2d at 1355-56, the fact that no

arrest was made here indicates at most that a reasonable person would have believed his arrest was not imminent.[10]

The remaining indicia, however, all weigh heavily towards finding custody. First, the freedom of movement indicia, discussed above, weighs heavily towards finding custody. Second, with respect to whether LeBrun initiated the interview, when the authorities confront a suspect at work they are usually held to have instigated the interview. *United States v. Carter*, 884 F.2d 368, 451 (8th Cir.1989). In the present case the agents appeared at LeBrun's workplace, summoned him to the Highway Patrol office, and conspired to keep him ignorant of the reason why they wanted to interrogate him. Consequently, the Court holds that the September 21 interview was instigated by law enforcement officers, and LeBrun cannot be said to have "voluntarily acquiesced to a request for an interview" within the meaning of *Griffin* or *Carter*.

The third indicia of custody is whether the agents employed strong arm tactics and deceptive stratagems. The evidence that the agents did so is overwhelming. Agents Early and Grebas repeatedly lied to LeBrun about the strength of the evidence against him, telling him that they had a suicide note written by one of his shipmates implicating him, that two other shipmates had severe emotional problems because of what they had witnessed him do, and that the

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[10] After reviewing all the evidence the Court suspects that the agents were in fact trying to circumvent *Miranda* in the sense that they wanted to take advantage of the inherently coercive aspects of a custodial interrogation without reading LeBrun his rights. Apparently, the agents believed that if they told LeBrun he was not under arrest and did not arrest him at the conclusion of the interrogation then they could conduct a custodial interrogation without reading him his rights.

evidence against him was "incontrovertible." The agents also told LeBrun that they controlled the decision whether he would be prosecuted when they knew they did not, and told LeBrun he would be prosecuted for murder in Alaska at great expense to his family when they knew he would not. The agents also threatened LeBrun that if he did not confess his family would be hounded by the media like Jon-Benet Ramsey's family was, and that if he was prosecuted in Alaska his pregnant wife would be left all alone. Indeed, the agents admitted they used strong arm tactics when they acknowledged that they tried to use psychological pressure to obtain a confession; they specifically said they talked about LeBrun's family and the cost of a trial because LeBrun had identified these things as important to him during the 1999 interviews.

And there is more: The agents masqueraded one of their own as Ensign Mun's brother to play upon LeBrun's vulnerable emotional state and empathy for other cancer victims. The government also promised, or at least led LeBrun to believe, that he would not be prosecuted if he confessed to a "spontaneous" killing. Finally, the agents engaged in the classic "Mutt and Jeff" routine, which the Supreme Court condoned in *Miranda* and the Eight Circuit has specifically associated with custody. *Griffin*, 922 F.2d at 1351. The agent also briefly used another tactic the *Miranda* Court criticized, the "blame the victim" technique. Although use of one or two deceptive techniques does not necessarily indicate custodial interrogation, the extensive use of such tactics demonstrates that LeBrun was in custody.

The fourth and final indicia the Court considers is whether the atmosphere of the questioning was police dominated. In making this determination the Court looks at the entire context of the interview, including its place, length, and

whether the police would appear to a reasonable person to have taken full control. *Id.* at 1352. Once LeBrun walked into the Highway Patrol building the police monitored and controlled his every movement, as evidenced by Agent Early's guarding LeBrun in the bathroom, and he was aware of this. The agents also sent LeBrun more subtle signals, for example, they removed any desks or tables that separated LeBrun's chairs from theirs so that LeBrun had nothing to hide behind or put between himself and the agents. Consequently, the Court holds that the interrogation was police dominated.

In sum, the Court holds that all but two of the *Griffin* factors and indicia indicate that LeBrun was in custody for *Miranda* purposes. The mitigating factors here are that the agents advised LeBrun prior to entering the Highway Patrol building that he was not under arrest and that he was free to end the interview at anytime, and that LeBrun probably never felt his arrest was imminent during the interrogation. The number and importance of the other factors outweighs the significance of these mitigating indicia though. Consequently, given the totality of the circumstances an objective, reasonable person in LeBrun's position would not have believed that he was free to leave. Therefore LeBrun was in custody for purposes of *Miranda* when questioned on September 21, 2000.

Identifying the precise moment LeBrun was placed in custody is difficult because LeBrun was placed in custody gradually. It appears LeBrun was in custody no later than when the agents began questioning him in the interrogation room. Therefore, any statements made by LeBrun after he entered that room are inadmissible. The Court now turns to the separate question of whether LeBrun's confession was voluntary.

2. Voluntariness of the confession

The American criminal justice system is an accusatorial system, not an inquisitorial system. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). As such, it reflects a long-standing aversion to statements wrung from the accused's own mouth and a preference for "evidence independently secured through skillful investigation." Robert S. Bloom, Mark S. Brodin, Criminal Procedure 245 (2nd ed. 1996) (quoting *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (Frankfurter, J.)). The Supreme Court has repeatedly held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they are condemned by the Due Process Clause of the Fourteenth Amendment. *Miller v. Fenton*, 474 U.S. 104, 109 (1985).

The voluntariness of a confession is a question of law. *Id.* at 111; *United States v. Jordan*, 150 F.3d 895, 898 (8th Cir. 1998). The government must prove by a preponderance of the evidence that the challenged statements are voluntary. *Lego v. Twomey*, 404 U.S. 477 (1972). A confession is involuntary if it was extracted by threats, violence, or direct or indirect promises such that a person's will is overborne and his or her capacity for self determination critically impaired. *United States v. Astello*, 241 F.3d 965, 967 (8th Cir. 2001). Psychological tactics or broken promises alone, however, are not sufficient to render a confession involuntary. *Tippitt v. Lockhart*, 859 F.2d 595, 597 (8th Cir. 1988). To determine whether a statement is involuntary the Court looks at the totality of the circumstances surrounding the confession. *Jordan*, 150 F.3d at 898. One set of factors concerns the suspect's unique characteristics and vulnerabilities, such as his age, level of education, intelligence, mental stability, sobriety, and familiarity with the criminal justice process.

Another set of factors concerns the manner in which the authorities conducted the interview, including the length of the questioning; the use of trickery, deception, threats, or promises of leniency; whether the agents advised the suspect of his constitutional rights; whether the suspect was deprived access to his family or friends; the use of physical punishment, such as the deprivation of food or sleep and the presence of psychological mistreatment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Jordan*, 150 F.3d at 898; Robert S. Bloom, Mark S. Brodin, Criminal Procedure 246 (2nd ed. 1996).

Unfortunately, there is no single indicator or set of facts that the Court can look to which is dispositive of the voluntariness issue. As commentators have observed, "the totality of the circumstances standard is by its very nature subjective, imprecise, and ad hoc." Bloom and Brodin, *supra*, at 247-48. The Supreme Court has held that the determination whether a statement is involuntary "requires more than a color-matching of cases," it "requires careful evaluation of all the circumstances of the interrogation." *Mincey v. Arizona*, 437 U.S. 385, 401 (1978) (citations omitted).

After carefully examining the record, the magistrate found that NCIS investigators had complete control over the interrogation, that the agents used numerous psychological tactics to extract a confession from LeBrun, that he was never read his *Miranda* warnings, and that Agents Early and Grebas promised him he would not be prosecuted if he confessed to a "spontaneous" murder. With respect to LeBrun's capacity to resist pressure, the magistrate found that LeBrun was mature, well-educated, and responsible, but that he was vulnerable to pressure concerning his cancer illness and pregnant wife. The magistrate concluded that given his

vulnerabilities, Le Brun had "no choice" but to confess to a "spontaneous" killing.

The government "vigorously" objects to each of the magistrate's findings of fact and application of law. After examining the government's objections the Court affirms the magistrate's conclusion.

LeBrun's personal characteristics and vulnerabilities

The government agrees with the magistrate's description of LeBrun's characteristics, but disagrees with the magistrate's finding that LeBrun was sufficiently vulnerable to pressure from law enforcement agents to render his confession involuntary. The Court finds that LeBrun was particularly vulnerable to psychological pressure concerning his pregnant wife, his family, and his health. The agents acknowledged as much when they admitted that they talked about LeBrun's family and the cost of a trial during the interrogation precisely because the agents had identified those things as important to LeBrun during the 1999 interviews.

The authorities failure to give *Miranda* warnings

The magistrate cited the fact that investigators did not read LeBrun his *Miranda* warnings as relevant conduct in holding his confession involuntary. The magistrate also acknowledged that prior to entering the Highway Patrol building Agent Early advised LeBrun that he was free to leave at any time, and that LeBrun "generally understood" his constitutional rights.

The magistrate rightly noted that the authorities failure to advise a suspect of his rights is one factor that indicates an involuntary confession. *United States v. Mendoza*, 85 F3d

1347, 1350 (8th Cir. 1996). The fact that LeBrun has considerable education and believed on September 21 that he "generally understood" his constitutional rights, however, increases the likelihood that his confession was voluntary, and ameliorates the fact that LeBrun was never read his rights and had no prior experience with the criminal justice system.

The investigator's control of the interrogation

The magistrate found that the NCIS investigators had complete control over the interrogation. The government disagrees, and argues that LeBrun invited the agents to contact him in September of 2000, that LeBrun voluntarily accompanied investigators to the Highway Patrol building, and that LeBrun was free to leave at any time.

The Court finds that the authorities had nearly complete control over the interrogation. At the conclusion of the 1999 interviews LeBrun agreed to stay in touch with Agent Hughes, but he never invited unknown NCIS investigators to appear at his workplace unannounced. Indeed, if LeBrun had extended such an invitation, Agent Early would not have been reluctant to identify himsef as an NCIS investigator when he went to LeBrun's workplace. Furthermore, as discussed in the *Miranda* portion of this order, LeBrun did not voluntarily accompany investigators to the Highway Patrol building. With respect to LeBrun's disbelief regarding his freedom to leave, although the government insists LeBrun believed he could leave at any time, this is not the case.[11] On cross

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[11] In its brief to this Court the government argues, "Indeed, defendant testified 'If I wanted to leave, I could just ask them to take me back.' TR 187." Objections to Magistrate's Report and Recommendation at 25. This is misleading. The actual exchange was:

ATTORNEY: And can you tell the Court what you remember

examination LeBrun said, "although they told me I was free to leave, I wasn't really sure that I was." The Court also notes that the government does not dispute that the agents choose the time and place of the interrogation, manipulated the atmosphere in the room, and then "totally dominated the conversation" during the interrogation. Magistrate's Report and Recommendation at 18. In light of the above, the Court agrees with the magistrate's conclusion.

The government also argues that while the agents' behavior may have offended the magistrate, virtually all interrogations are controlled by the authorities, and there is nothing inherently unlawful about the way this interrogation was conducted. Objections to Magistrate's Report and Recommendation at 9-10. The government is correct that there is nothing inherently illegal about authorities controlling an interrogation. Custodial interrogation, however does have inherently coercive tendencies, and it is the coercive aspect of this interrogation which concerns the Court.

Physical coercion

The government points out that the agents physically threatened LeBrun. While instructive, this fact is not dispositive since it has long been settled that "the blood of the accused is not the only hallmark" of an involuntary

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> *[Agent Early] told you*?
> LeBRUN: I just remember we were getting ready to walk in and *he said* that this is – that I could terminate the interview at any time and I would be free to leave at any time. If I wanted to leave, I could just ask them to take me back.

Tr. at 187 (emphasis added). LeBrun was not saying he believed he was free to leave at any time, he was simply telling the Court what Agent Early had told him.

confession. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

The investigator's use of trickery, deception, threats, and promises of nonprosecution.

The magistrate found that the agents used deception, threats and promises to induce LeBrun to confess, and that these tactics were designed to play on the fact that LeBrun was recovering from cancer and had a pregnant wife. Specifically, the agents lied about the evidence against LeBrun; told him if he did not confess he would undergo a criminal trial in Alaska which would ruin his family financially and leave his pregnant wife alone; and promised him that if he confessed to a "spontaneous" murder he would not be prosecuted.

The Court accepts the magistrate's findings, except those pertaining to the promise of nonprosectution. The Court finds that LeBrun *believed* he would not be prosecuted if he confessed to a "spontaneous" murder. The Court does not make any findings as to what–if any– promise was actually made, or what the legal effect of any promise is. The Court also makes additional findings that the magistrate did not explicitly make, namely, finds the investigators used the "Mutt and Jeff" and "blame the victim" techniques described in *Miranda*, and that an NCIS agent masqueraded as Mun's brother to appeal to LeBrun's empathy for a dying cancer patient.

To its credit, the government does not deny the agents used such tactics, or that LeBrun was particularly susceptible to them. The government simply argues that "the Courts of Appeal [sic] have ruled similar tactics permissible," and cites cases where the Eight Circuit held that misrepresentations by the police regarding evidence, *Krimmel v. Hopkins*, 44 F.3d

704 (8th Cir.1995), or a promise of leniency, *United States v. Astello*, 241 F.3d 965 (8th Cir.2001), or a defendant's mistake of law, *Winfrey v. Wyrick*, 826 F.2d 406 (8th Cir.1997), or a police officers promise of nonprosecution, *United States v. Larry*, 126 F.3d 1077 (8th Cir.1997), was not enough to render a confession involuntary.

The fact for these cases, however, are not sufficiently analogous to LeBrun's for their holdings on these points to be persuasive. All of them involve a defendant-confessor who was read his *Miranda* rights before he confessed, and some are distinguishable in other ways. In *Larry*, for example, the defendant was a career criminal with thirteen prior convictions and no particular vulnerabilities to police pressure. LeBrun, on the other hand, had no prior contact with the criminal justice system before this case, and had several psychological vulnerabilities which the authorities were actively exploiting.

Furthermore, the government cites no case law–nor can the Court find any–which condones the use of "Mutt and Jeff" and "blame the victim" tactics, or approves of government agents posing as the victim's dying brother or appealing to the welfare of a suspect's pregnant wife to try and wring a confession from the defendant. Indeed, the Supreme Court has rejected these kinds of tactics before. *Miranda*, 384 at 449-55, 476; *Spano v. New York*, 360 U.S. 315 (1959) (holding confession involuntary where officer told the defendant, who was his close friend, that the officer would get into trouble if the defendant did not confess); *Rogers v. Richmond*, 365 U.S. 534, (1961) (holding confession involuntary where suspect confessed to murder after interrogator pretended to summon suspect's ill wife to the police station for questioning).

Finally, although the police may use some of these tactics sparingly without rendering a confession involuntary, they may not combine them en masse as they have here. "A totality of the circumstances analysis does not permit [the authorities] to cherry-pick cases that address individual potentially coercive tactics, isolated one from the other, in order to insulate themselves when they have combined all of those tactics in an effort to overbear an accused's will." *Wilson v. Lawrence County*, 260 F.3d 946, 953 (8th Cir.2001). This rule makes sense, if the law were otherwise then the conduct of the agents here would cast a shadow over the vast majority of confessions which are voluntary and which are given to law enforcement agents who use such psychologically coercive tactics sparingly, if at all.

In conclusion, the court finds the following facts. With respect to LeBrun's personal characteristics, the Court finds LeBrun has considerable education and claims to have "generally" understood his rights, but he was particularly vulnerable to psychological pressure from investigators concerning his pregnant wife, his family, and his health. With respect to the manner in which the interrogation was conducted, the Court finds that NCIS investigators exerted near total control over the interrogation and employed numerous psychologically coercive tactics, some of which were aimed at LeBrun's unique vulnerabilities, in order to make him confess. Consequently, the Court holds that LeBrun's will was overborn when he confessed to NCIS agents and Mary Lou Taylor. At the very least, the government has not met its burden of proving that these statements were voluntarily made. Therefore, all of LeBrun's statement made on September 21, 2000 are inadmissible.

3. **Whether the defendant may be prosecuted for premeditated murder.**

In footnote seven of its Objections to the Report and Recommendation, the government requests clarification whether the defendant may by prosecuted for first-degree, premeditated murder. In light of the prohibition against federal courts issuing advisory opinions, and the fact that this dispute is not pending before the Court, the Court decliness to render an opinion on this issue. *Flast v. Cohen,* 392 U.S. 83, 96-97 (1968).

III. Conclusion

For the reasons discussed herein, the Court GRANTS the Defendant's amended motion to suppress (doc. 22).

IT IS SO ORDERED

_____

Dean Whipple
United States District Judge

Date: 11-16-01

§ 1111.Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States, whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

(c) For purposes of this section–

(1) the term "assault" has the same meaning as given that term in section 113;

(2) the term "child" means a person who has not attained the age of 18 years and is–

(A) under the perpetrator's care or control; or

(B) at least six years younger than the perpetrator;

(3) the term "child abuse" means intentionally or knowingly causing death or serious bodily injury to a child;

(4) the term "pattern or practice of assault or torture" means assault or torture engaged in on at least two occasions;

(5) the term "serious bodily injury" has the meaning set forth in section 1365; and

(6) the term "torture" means conduct, whether or not committed under the color of law, that otherwise satisfies the definition set forth in section 2340(1).

(2)

Supreme Court, U.S.
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No. 04-332

In the Supreme Court of the United States

MICHAEL EDWARD LEBRUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when he voluntarily went to a police station to be interviewed and was advised that he was free to leave at any time.

2. Whether petitioner's confession to murder was involuntary under the Due Process Clause when he was told that he would not be prosecuted if he confessed to a "spontaneous" killing.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-24) is reported at 363 F.3d 715. The panel opinion of the court of appeals (Pet. App. 25-53) is reported at 306 F.3d 545. The order of the district court denying petitioner's motion to suppress (Pet. App. 54-89) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2004. The petition for a writ of certiorari was filed on July 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Missouri on one count of felony murder, in violation of 18 U.S.C. 1111. Petitioner moved to suppress his confession to the murder. The district court granted petitioner's motion. Pet. App. 54-89. A panel of the court of appeals initially affirmed. *Id.* at 25-53. After granting rehearing en banc, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

1. During the Vietnam war, petitioner served in the Navy as a disbursing clerk aboard the *U.S.S. Cacapon*. Petitioner reported to Ensign Andrew Muns, the ship's disbursing officer. On January 16 or 17, 1968, while the ship was moored in the Philippines, Muns disappeared. After conducting an investigation, the Naval Criminal Intelligence Service (NCIS) concluded that Muns had stolen $8600 from the disbursing office and then deserted. Pet. App. 2.

Thirty years later, Muns's sister convinced the NCIS Cold Case Homicide Unit to reopen the investigation. In 1999, NCIS agents interviewed petitioner four times; on three of those occasions, they administered the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By that time, petitioner was in his fifties; he had attended college and completed one year of law school. Petitioner voluntarily answered the agents' questions during the interviews. On one occasion, petitioner told the agents that he may have been involved in Muns's death and that he felt he had repressed memories concerning the incident. He asked the officers whether they knew of a therapist who could help him recover those memories. Following those interviews, the agents

had no significant contact with petitioner for approximately ten months, while they investigated other leads. Pet. App. 2-3, 71.

After pursuing those leads, the NCIS agents identified petitioner as the prime suspect in the case. Accordingly, they decided to interview him again. On September 21, 2000, NCIS Special Agent David Early, accompanied by a Missouri Highway Patrol trooper, went to petitioner's place of employment, told him they were conducting an investigation, and asked if he would accompany them to the local Missouri Highway Patrol office for an interview. The officers were dressed in plain clothes and said that they could not tell petitioner the nature of the investigation, though they assured him that it had nothing to do with his family. Petitioner testified that he agreed to accompany the officers because he believed they might be investigating criminal allegations concerning his employer, a real estate developer. When petitioner volunteered to drive to the station himself, the officers stated that they would prefer it if he were to ride with them. Petitioner agreed and rode to the station in the front seat of the officers' unmarked patrol car. The doors of the car were unlocked during the trip, and petitioner was not restrained in any way. Pet. App. 3; Gov't C.A. Br. 7-8.

After arriving at the station, but before going inside, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. The officers then took petitioner to a windowless interview room. NCIS agents had prepared the room by placing enlarged photographs of scenes from petitioner's life on the walls. At the start of the interview, Agent Early and NCIS Special Agent Jim Grebas identified themselves. The NCIS agents did not

administer *Miranda* warnings to petitioner; they testified that they had believed that the warnings were not necessary because petitioner was not "in custody" for *Miranda* purposes. Petitioner testified that he had been aware of his *Miranda* rights during the interview; that, at the start of the interview, he had believed that he was not in custody and was free to leave at any time; and that, as the interview progressed, "[he] believe[d] they would have let [him] go, but [he] wasn't sure." Pet. App. 3-4, 28 n.3; 4/27/01 Tr. 202.

During the interview, the NCIS agents used various strategies to facilitate a confession. For example, the agents told petitioner that there was "absolutely no doubt" about his guilt and that they had significant evidence establishing him as the killer. Specifically, they suggested that there were eyewitnesses to Muns's death and that they had a suicide note from another individual implicating petitioner in the death. They also stated that the United States Attorney for the District of Alaska was preparing to charge petitioner with premeditated murder and that a protracted trial in a distant district would drain his financial resources and ruin his family's reputation. Finally, they told petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, because the statute of limitations for manslaughter had expired. Pet. App. 4, 29, 43-44.[1]

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[1] The exchanges included the following:

GREBAS: And if you will be man enough and stand up to the plate and say, you know what guys, it was "spontaneous." We are on the phone saying we got a problem with the statute of limitation. It's possible, beyond possible; you won't be prosecuted at all. And

I want to throw-up when I say that, but I will—that's my word to you.

LEBRUN: Right.

GREBAS: Special Agent Early?

EARLY: Absolutely.

LEBRUN: What's the statute of limitation?

GREBAS: There is no second-degree murder.

EARLY: It's five years from the time of the incident. It's called "manslaughter" in the federal system.

* * * * *

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.

Pet. App. 42-44.

At the various points during the interview, the agents permitted petitioner to take accompanied breaks in order to use the restroom, have a cup of coffee, and smoke a cigarette. They allowed him to use his mobile telephone to call his wife. And they informed him repeatedly that he would be "going home today." Pet. App. 4, 70; 4/27/01 Tr. 107.

After being questioned for approximately 33 minutes, petitioner confessed to Muns's murder. He explained that, while he was robbing a safe in the disbursing office, Muns had walked into the room. He stated that he had rushed Muns and killed him by strangling him and repeatedly smashing his skull against the deck. He added that he had disposed of Muns's body by dumping it into a tank of caustic fuel oil. At the agents' urging, he then physically reenacted the murder, with Agent Early playing the role of Muns. Pet. App. 4, 30.

After petitioner confessed, the NCIS agents asked him whether he wanted to apologize to Muns's sister, who had flown in from Milwaukee, and to Muns's fictitious brother, an NCIS agent who pretended that he had advanced cancer. Petitioner, who was himself recovering from cancer, agreed to speak to them, told them he was responsible for Muns's death, and apologized. Approximately two hours after the interview began, petitioner consented to a search of his house. The agents drove petitioner to his house and searched it, but found nothing. The agents then left petitioner at home. Pet. App. 4-5, 69-70.

2. Petitioner was subsequently arrested and charged with one count of felony murder, in violation of 18 U.S.C. 1111. Before trial, petitioner moved to suppress his initial confession (together with his subsequent confession to Muns's sister and fictitious brother) on the

grounds (1) that he had been subjected to custodial interrogation without receiving *Miranda* warnings and (2) that his initial confession was involuntary. Agreeing with petitioner on both grounds, the district court granted the motion. Pet. App. 54-89.

3. A panel of the court of appeals initially affirmed. Pet. App. 25-53. After granting rehearing en banc, however, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

a. The en banc court of appeals first held that petitioner was not "in custody" for purposes of *Miranda* at the time of the confession. Pet. App. 5-14. At the outset, the court recognized that, in determining whether petitioner was in custody, "[t]he 'ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* at 7 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

After considering the totality of the circumstances, the court of appeals determined that petitioner was not in custody. Pet. App. 7. The court discounted the facts that the interview had occurred in a small, windowless room at the station and that the authorities had used psychological tactics, some concededly deceptive, in order to produce incriminating responses. *Id.* at 8. In doing so, the court relied heavily both on this Court's decision in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per curiam), in which the Court held that the mere fact that an interview occurred in a "coercive environment" did not render the interview custodial, and on this Court's subsequent decision in *Beheler*. Pet. App. 8. The court of appeals reasoned that "*Mathiason* and *Beheler* teach us that some degree of coercion is part and parcel of the interrogation process," and that the

critical inquiry was instead whether "a reasonable person would perceive the coercion as restricting his or her freedom to depart." *Id.* at 9. Applying those decisions, the court found that "[t]he facts of this case are in all relevant respects indistinguishable from *Mathiason* and *Beheler*, and they dictate the conclusion that [petitioner] was not in custody within the meaning of *Miranda*." *Id.* at 10.[2] The court noted that petitioner was never physically restrained; was never placed in handcuffs; was told before the interview began that he was free to leave; and had his mobile telephone with him and used it to call his wife from the interview room. *Id.* at 9-10. Based on those facts, the court concluded that petitioner "would not have perceived that his freedom of action was restrained to the degree associated with formal arrest, and was therefore not 'in custody.'" *Id.* at 13-14.

b. The court of appeals next held that petitioner's confession was not involuntary under the Due Process Clause. Pet. App. 14-19. The court asserted that, in assessing the voluntariness of a confession, "our polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *Id.* at 16-17. The court observed that "[t]he facts surrounding the confession are straightforward." *Id.* at 14. Specifically,

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[2] The court of appeals also considered a number of its own decisions and concluded that, "where there is no clear indication that the defendant's freedom to depart has been restricted, we have typically concluded that a police station interview was noncustodial." Pet. App. 11. Although the court acknowledged that it had reached a contrary result in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001), the court reasoned that *Hanson* was "readily distinguishable," and overruled it to the extent it was not. Pet. App. 11-12.

the court noted that petitioner confessed after only 33 minutes of questioning, and that the agents neither physically threatened petitioner nor shouted at him. *Ibid.* Although the court acknowledged that the agents had used psychological tactics to facilitate a confession, it reasoned that the mere use of such tactics was insufficient, by itself, to render a confession involuntary. *Ibid.*

The court of appeals next rejected the district court's conclusion that the psychological tactics, when coupled with the agents' statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, rendered his confession involuntary. Pet. App. 14-15. At the outset, the court of appeals noted that the district court had made no findings as to what, if any, promise the officers had made to petitioner, much less what legal effect such a promise would have. *Id.* at 16. Instead, the court of appeals observed that the district court had found only that petitioner *believed* that he would not be prosecuted if he confessed to a "spontaneous" killing. *Ibid.* Even assuming that the agents' statements could be viewed as a promise to petitioner, however, the court reasoned that such a promise did not render petitioner's confession involuntary *per se*, but served only as one factor in the totality of the circumstances. *Ibid.* In addition to the factors it had already discussed, the court asserted that a number of other countervailing factors suggested that petitioner's confession was voluntary. *Id.* at 18-19. Specifically, the court noted (1) that petitioner testified that he was aware of his *Miranda* rights during the interview; (2) that petitioner was a "sophisticated individual with legal training"; (3) that petitioner "did not display any unique sensitivity that would indicate that the agents might overbear his will"; and (4) that "[t]he videotape of

the interview demonstrates that [petitioner] was composed and aware of his surroundings and the circumstances confronting him." *Ibid.* The court added that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by confessing to 'spontaneous' murder." *Id.* at 19. "Whatever his motivation," the court concluded, "it is clear to us that [petitioner's] capacity for self-determination was not impaired." *Ibid.*

c. Judge Morris Sheppard Arnold, joined by three other judges, dissented. Pet. App. 19-24. In his opinion, Judge Arnold addressed only the issue whether petitioner's confession was voluntary. Judge Arnold first noted that "it appears to me that [petitioner's] confession was the product of an overborne will." *Id.* at 19. He contended that there was ample evidence that "the atmosphere at the interrogation was police-dominated." *Id.* at 20.

With specific regard to the agents' statements concerning a "spontaneous" killing, Judge Arnold noted that, even if the officers had not made an express promise to petitioner, "[t]he coercive effect, if any, of a reasonably perceived promise is exactly the same as that of an actual promise." Pet. App. 22. He conceded, however, that "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." *Id.* at 22-23. While "[s]uch techniques may be reprehensible," Judge Arnold continued, "that fact would not seem to contribute to their propensity to overwhelm the will." *Id.* at 23. He suggested that "what lies at the bottom of these kinds of cases is not merely an aversion to something called coercion, but a general

uneasiness about the fairness of admitting confessions that were induced by knowing, lurid falsehoods and unfulfilled promises, whether 'coercive' or not." *Ibid.*

ARGUMENT

Petitioner renews his claims (Pet. 13-28) that he was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at the time of his confession, and that his confession to the murder was involuntary. The court of appeals' fact-bound application of settled law to those claims does not warrant further review.

1. Petitioner first contends (Pet. 13-20) that the court of appeals erred by holding that he was not "in custody," and therefore was not entitled to receive *Miranda* warnings, at the time of his confession. That contention lacks merit.

a. Under *Miranda*, statements taken in custodial interrogation must generally be preceded by specified warnings in order to be admissible in the government's case in chief. *Miranda* warnings, however, are not required in every instance of official questioning; instead, they are necessary "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). In a series of post-*Miranda* decisions, this Court has made clear that, in determining whether an individual was in custody, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495); accord *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995); *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam); *Berkemer* v. *McCarty*, 468 U.S.

420, 440 (1984). This Court has emphasized that, in making that determination, a reviewing court must examine "the objective circumstances of the interrogation," *Stansbury*, 511 U.S. at 323, in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave," *id.* at 325.

The court of appeals correctly applied those principles in holding that petitioner was not "in custody" during the interview. When the officers asked petitioner to accompany them to the station, petitioner voluntarily agreed to accompany them. The doors were unlocked during the trip, and petitioner was not restrained in any way. Perhaps most importantly, before going inside the station, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. During the interview, the NCIS agents never physically restrained petitioner, and they informed him repeatedly that he would be "going home today." They also allowed him to use his mobile telephone in order to call his wife. Finally, at the end of the interview, they drove petitioner back to his house. Because all of those facts suggest that a reasonable person in petitioner's position would have felt free to leave, the court of appeals' holding that petitioner was not in custody for purposes of *Miranda* was correct and does not merit further review.[3]

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[3] In concluding that petitioner was not "in custody," the court of appeals also relied on the fact that petitioner was in his fifties; had attended college and completed one year of law school; and had previously been interviewed by NCIS investigators. Pet. App. 12-13. In *Yarborough* v. *Alvarado*, 124 S. Ct. 2140 (2004), issued after the decision below, this Court cast doubt on the relevance to the custody inquiry of a suspect's age, education, and prior experience with law enforcement. See *id.* at 2150-2152. There is no need, however, to

b. With regard to his *Miranda* claim, petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decision in *Mathiason*. That contention is erroneous.

In *Mathiason*, an officer investigating a burglary left a card at a suspect's apartment, asking the suspect to call him. The suspect did so and agreed to meet the officer at the state patrol office. When the suspect arrived, the officer told him that he was not under arrest. The officer then told the suspect that the police believed he was involved in the burglary, and falsely informed him that his fingerprints had been found at the scene. The suspect subsequently confessed to the burglary. At the end of the interview, the suspect was allowed to leave the office. 429 U.S. at 493-494.

This Court held that the suspect was not "in custody" for *Miranda* purposes. *Mathiason*, 429 U.S. at 494-496. The Court reasoned that "there [was] no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." *Id.* at 495. The Court noted that the suspect had voluntarily come to the police station, was immediately informed that he was not under arrest, and had left the police station without hindrance once the interview was completed. *Ibid.* The Court specifically rejected the suspect's contention that "a noncustodial situation is * * * converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the

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remand this case for further consideration in light of *Yarborough*. Petitioner does not challenge the court of appeals' reliance on those characteristics in making the custody determination, and nothing in the court of appeals' decision suggests that it viewed those characteristics as outcome-dispositive.

absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Ibid.* The Court reasoned that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it," and noted that neither the fact that the questioning took place at the station nor the fact that the questioned individual was a suspect altered the analysis. *Ibid.* Finally, the Court reasoned that the officer's false statement concerning the purported discovery of the suspect's fingerprints at the scene "ha[d] nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Id.* at 496.

This case is materially indistinguishable from *Mathiason.* Although the officers did not specifically offer petitioner the opportunity to decide where and when any interview would take place, petitioner voluntarily consented to the interview, and was not physically restrained either on the way to the interview or during the interview itself. Like the suspect in *Mathiason*, who was told at the outset of the interview that he was not under arrest, petitioner was told that he was not under arrest and that he was free to terminate the interview and leave at any time.

The interview in this case occurred in a windowless room at a police station, much like the interview in *Mathiason*, which took place "behind closed doors at police headquarters." 429 U.S. at 496 (Marshall, J., dissenting). The various psychological tactics used by the officers during petitioner's interview were no different in kind from the false statement made by the officer in *Mathiason*, which the Court concluded was irrelevant to the custody inquiry. 429 U.S. at 496. Finally, to the extent that the agents intended the

interview more closely to resemble a "formal" interrogation, that fact does not justify a different outcome, because this Court has held that the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant to the custody inquiry. *Stansbury*, 511 U.S. at 323.[4] Because the decision below is consistent with *Mathiason* in all relevant respects, and because petitioner identifies no other conflict between the decision below and any other decision of this Court or another court of appeals,[5] further review of petitioner's *Miranda* claim is unwarranted.

2. Petitioner next contends (Pet. 20-27) that the court of appeals erred by holding his confession was voluntary under the Due Process Clause. That contention also lacks merit.

a. An individual's confession is involuntary if, because of the government's conduct, "his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). The court must consider "the

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[4] Petitioner also contends (Pet. 18-19) that, in the course of the interview, the NCIS agents repeatedly made statements implying that he would not be allowed to go home until the interview was completed. In the statements at issue, however, the agents merely suggested that, if petitioner confessed to a "spontaneous" killing, the *investigation* would come to an end—not that petitioner was not free to terminate the interview. See, *e.g.*, Exh. E-2, at 15, 16-17.

[5] Petitioner suggests (Pet. 16-18) that the court of appeals' decision conflicts with its earlier decision in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001). This Court, however, does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no such conflict exists because, to the extent that *Hanson* conflicted with the decision in this case, the en banc court of appeals expressly overruled it. Pet. App. 11-12.

totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The relevant characteristics of the individual include his age, education, physical condition, mental health, and criminal experience; the relevant details of the interrogation include the use of coercive tactics, the length of the interrogation, and its location. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 693-694 (1993); *Schneckloth*, 412 U.S. at 226; *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

The court of appeals correctly engaged in the required totality-of-the-circumstances inquiry in concluding that petitioner's confession was voluntary. The court of appeals acknowledged both that the agents used psychological tactics to facilitate a confession and that the agents made statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing. The court, however, then cited a number of facts that suggested that petitioner's confession was voluntary, including (1) that petitioner confessed after only 33 minutes of questioning; (2) that the agents neither physically threatened petitioner nor shouted at him; (3) that petitioner testified that he was aware of his *Miranda* rights at the time of the interview; and (4) that petitioner was in his fifties and had attended college and completed one year of law school. Moreover, after reviewing the videotape of the confession, the court of appeals observed that petitioner remained composed and aware throughout the interview and did not display any unique sensitivity to the agents' questioning, and ultimately determined that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by con-

fessing to 'spontaneous' murder." Pet. App. 19. Based on all of those considerations, the court of appeals concluded that the agents did not overbear petitioner's will and thereby render his confession involuntary. That intensely fact-bound conclusion does not warrant this Court's review.

b. With regard to his voluntariness claim, petitioner does not contend that the court of appeals' decision directly conflicts with any decision of another court of appeals. Instead, he contends only that it conflicts with this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), by refusing to hold petitioner's confession involuntary notwithstanding the agents' statements to petitioner that he would not be prosecuted for a "spontaneous" killing.

Petitioner correctly notes that, in *Bram*, this Court stated that "a confession, in order to be admissible, * * * must not be * * * obtained by any direct or implied promises, however slight." 168 U.S. at 542-543 (citation omitted). The Court has since recognized, however, that "this passage from *Bram* * * * under current precedent does not state the standard for determining the voluntariness of a confession." *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). In the wake of *Fulminante* and other decisions by this Court, "there has been a movement away from treating * * * promises of leniency as *per se* producing involuntariness." 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c) at 454 (2d ed. 1999). Instead, like the court of appeals in this case, lower courts have treated a promise of leniency as but one factor in the totality of the circumstances under which the voluntariness of a confession is judged. See, *e.g.*, *Green* v. *Scully*, 850 F.2d 894, 901 (2d Cir.) (noting that "the presence of a direct or implied promise of help

or leniency alone has not barred the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision"), cert. denied, 488 U.S. 945 (1988); *Miller* v. *Fenton*, 796 F.2d 598, 608 (3d Cir.) (noting that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will"), cert. denied, 479 U.S. 989 (1986). Even assuming, therefore, that the agents' statements to petitioner could properly be characterized as a promise of leniency, the court of appeals did not err by holding that such a promise did not automatically render his confession involuntary.[6]

c. Petitioner appears to contend in the alternative that the agents' broader use of deceptive psychological tactics rendered his confession involuntary. This Court, however, has rejected the view that misrepresentations to a suspect automatically justify exclusion of a suspect's confession. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). Indeed, as the dissenting opinion below sug-

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[6] This case would present a poor vehicle for reconsideration of the prevailing rule that a promise of leniency does not automatically render a confession involuntary, insofar as it is questionable whether the agents' statements constituted a relevant promise of leniency at all. The agents did suggest (correctly, see 18 U.S.C. 3282) that petitioner could not be prosecuted if he confessed to a "spontaneous" killing (that is, manslaughter under 18 U.S.C. 1112), but they did not indicate that petitioner would not be prosecuted if he confessed to felony murder (under 18 U.S.C. 1111), and they affirmatively suggested that petitioner *would* be prosecuted if he confessed to premeditated murder (also under 18 U.S.C. 1111). Rather than confessing merely to a "spontaneous" killing, however, petitioner plainly confessed to felony murder, and arguably confessed to premeditated murder as well. Pet. App. 4, 30. The agents therefore did not breach any limited promise of leniency that was made.

gested, "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." Pet. App. 22-23 (opinion of Morris Sheppard Arnold, J.).[7] Ultimately, the court of appeals' conclusion that, under the totality of the circumstances, petitioner's confession was voluntary despite the agents' use of both deceptive and non-deceptive psychological tactics is fact-bound and does not warrant further review.[8]

3. Finally, any review of the court of appeals' decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charge in this case. If petitioner is acquitted following a trial on the merits, the claims that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claims—together with any other claims he might have—in a petition for writ of certiorari seeking review

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[7] Although the dissenting opinion did suggest that false statements by the police, while not rendering a confession involuntary, may otherwise violate the Due Process Clause, Pet. App. 23 (opinion of Morris Sheppard Arnold, J.), petitioner advances no due process claim apart from an involuntariness claim. This case therefore does not present any broader question concerning the circumstances, if any, under which deceptive police tactics during an interrogation raise due process concerns. Nor was the level and type of trickery here of a character to raise such concerns.

[8] Petitioner also contends (Pet. 27-28) that the court of appeals erred by holding that his subsequent confession to Muns's sister and fictitious brother was admissible. His sole basis for that contention, however, is that the subsequent confession was the "fruit" of the impermissibly obtained initial confession. See *Wong Sun* v. *United States*, 371 U.S. 471, 484-487 (1963). Because the initial confession was in fact constitutionally obtained, petitioner's contention lacks merit.

of the final judgment against him. Accordingly, this Court's review is not necessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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